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SUPREME COURT, U.S.

No. 74-405

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In The

Supreme Court of the United States

Clifford E. Warren,

Petitioner

The United States of America

Respondent

PETITION
FOR WRIT OF CERTIORARI

Filed October____1974

Clifford E. Warren
Pro se

Petitioner's Address:

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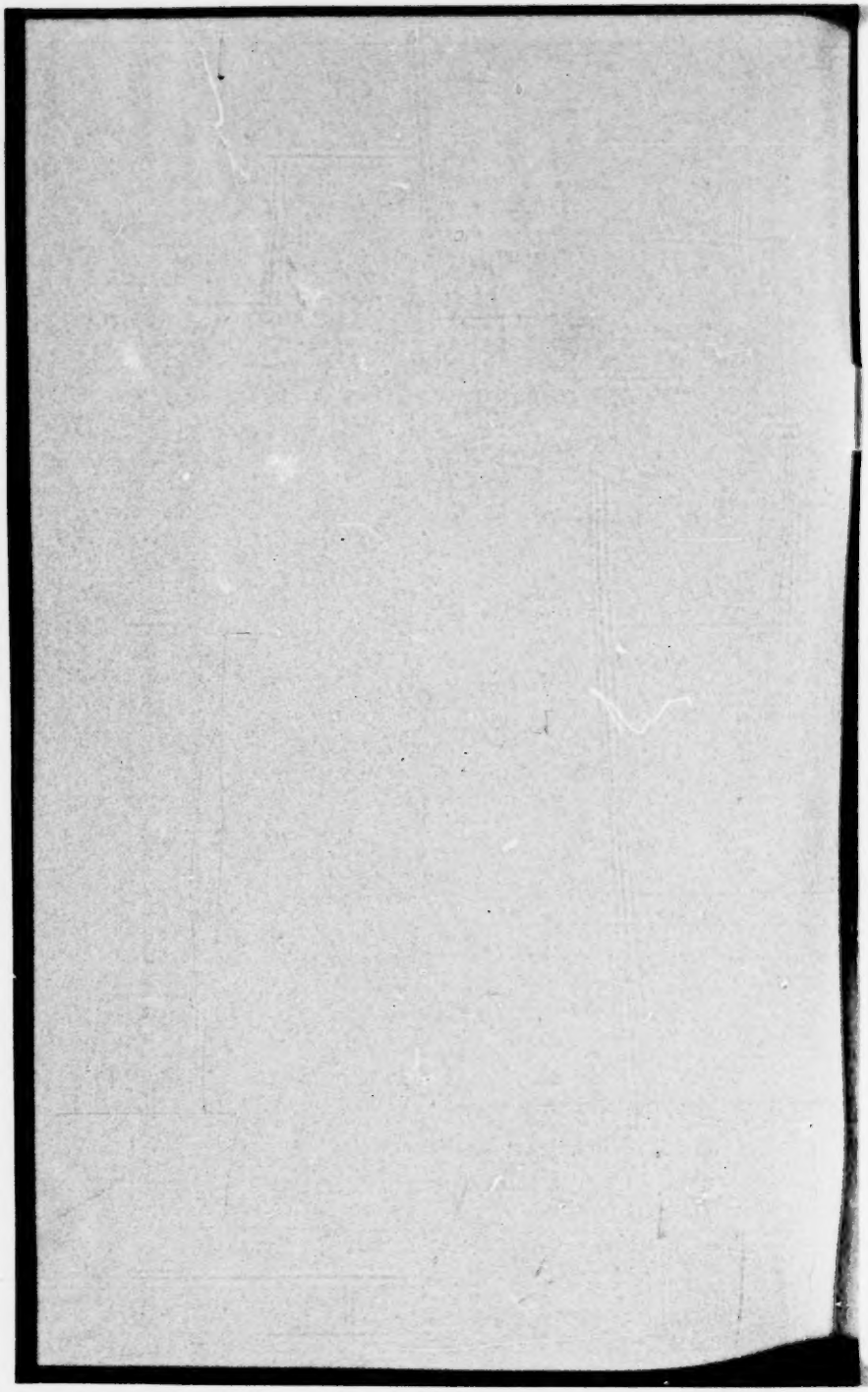


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IN THE

SUPREME COURT OF THE UNITED STATES

Clifford E. Warren,
Petitioner,

v.

The United States of America,
Respondent.

PETITION

FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States: The above named petitioner, Clifford E. Warren, respectfully represents:

1. Clifford E. Warren is a natural born citizen of the United States, a tax payer, and a resident of the State of Alaska. He and his wife, June, are the sole owners of Warren Painting Co., Inc. which is their only source of income.

2. The original dispute in Ct. Cl. 231-68 arose from Contract No. DA 95-507-ENG-2070, dated 12 January 1965 between Chris Berg, Inc., Contractor, and

The United States of America, Owner, acting oy and through the U. S. Army Corps of Engineers, Alaska District. Said contract called for Phase III Repair to the 5040th Hospital, Elmendorf Air Force Base, Alaska which had been severly damaged during the earthquake which struck Alaska on March 27, 1964.

3. The authorized funds in that contract were those allocated under 42 USC 1855 e. The contract work has been fully performed and accepted by the Govemment. Final payment has been made thereunder save as hereinafter set forth, plaintiff Berg having expressly reserved the claims which are the subject matter of this action. Chris Berg Inc. has given written permission to Warren Painting Co., Inc. to pursue the claims.

4. Ct. Cl. 231-68, Chris Berg Inc. v. United States, was processed by Warren Painting Co., Inc. (Clifford E. Warren) as legal representative of Chris Berg Inc.. The claims in that case involved painting work only, which had been directed to be performed by the defendants.

5. Judgment was entered in Ct. Cl. 231-68 on February 18, 1972 denying plaintiff Chris Berg Inc. all claims excepting a minor one amounting to approximately $800.00. Chris Berg Inc. reserved the right to further pursue the claims.

6. Petitioner's independent action to void, set aside, or reverse judgment in Ct. Cl. 491-73 was filed in December 1973.

7. Court of Claims Order granting respondent's Motion for Dismissal in Ct. Cl. 491-73 because of petitioner's alleged lack of standing is deted July 10, 1974.

JUDGMENTS AND OPINIONS RENDERED IN THE COURTS BELOW

1. Court of Claims Order dated July 10, 1974 in Ct.Cl. 491-73.

2. Court of Claims Judgment dated February 18, 1972 in Ct. Cl. 231-68.

The above are attached hereto.

GROUNDS ON WHICH THE JURISDICATION OF THIS COURT IS INVOKED

(i) The Court of Claims Order in Ct. Cl. 491-73 dated July 10, 1974 is erroneous.

(ii) The Court of Claims Judgment in Ct.Cl. 231-68 dated February 18, 1972 is illegal, null, and void and violates public policy.

(iii) The Court of Claims Judjment in Ct.Cl. 231-68 denied due Process.

(iv) The United States Court of Claims was without jurisdiction to render the void Judgment in Ct.Cl. 231-68.

(v) The jurisdiction of this Court is invoked pursuant to 28 USC 1255 (1970), Vol. 7, Page 7560.

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner's standing to attack the Judgment in Ct. Cl. 231-68.

2. The Judgment in Ct.Cl. 231-68 is illegal, null, and void because it was in direct violation of a Federal statute - 42 US 1855 e.

3. The Judgment in Ct.Cl. 231-68 is in defiance of all common law and that set down by the United States Supreme Court as to the interpretation of contracts.

4. The Judgment in Ct.Cl. 231-68 is so arbitrary as to deny due process as guaranteed under the Fifth and Fourteenth Amendments of the Federal Constitution.

5. The Judgment in Ct.Cl. 231-68 denied or impaired petitioner's right to contract as guaranteed by the Federal Constitution while the rights of others have not been so denied or impaired.

6. Abnigation of judicial function by the Court of Claims in refusing to interpret or apply a Federal statute and refusal to interpret a vital provision in the contract specifications favorable to the plaintiff.

7. In arriving at its Judgment in Ct.Cl. 231-68 the Court reworded a sentence in the contract specifications to create a patent ambiguity where no ambiguity had existed and so denied an important portion of the claims.

8. Whether the United States Supreme Court will grant petitioner a Motion or entertain a Motion of its own to void, set aside, or reverse the Judgment in Ct. Cl. 231-68.

9. Whether fraud upon the court was committed by respondents in Ct. Cl. 231-68.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

1. The Constitution of the United States:

   Article IV, Federal Relation
   Section 1. Full Faith and Credit
   Section 2. Privileges and Immunities of Citizens

   Amendment V, Rights of Persons

   Amendment XIV, Rights of Citizens

2. Statutes:

42 USC 1855 e.	Vol. 9 Page 7980
41 USC 321	Vol. 8 Page 9507
41 USC 322	Vol. 8 Page 9507

STATUTES

42 USC 1855 e. Vol. 9 Page 7980

Repair and reconstruction of damaged United States facilities; availability of funds:

If facilities owned by the United States are damaged or destroyed in any major disaster and the Federal agenty having jurisdiction thereof lacks the authority or an appropriation to repair, reconstruct, or restore such facilities, such Federal agency is authorized to repair, reconstruct, or restore such facilities to the extent necessary to place them in a reasonably usable condition and to use therefor any available funds not otherwise immediately required: Provided, however, that the President shall first determine that the repair, reconstruction, restoration is of such importance and urgency that it cannot reasonably be deferred pending the enactment of specific authorizing legislation or the making of an appropriation therefor If sufficient funds are not available to such Federal agency for use in repairing, reconstructing, or restoring such facilities as above provided, the President is authorized to transfer such Federal agency funds made available under this chapter in such amount as he may determine to be warranted in the circumstances. If said funds are insufficient

for this purpose, there is authorized to be appropriated to any Federal agency repairing, reconstructing, or restoring facilities under authority of this section such sum or sums as may be necessary to reimburse appropriated funds to the amount expended therefrom.

41 USC 321 Vol. 8 Page 9507

Limitation on pleading contract provisions relating to finality; standards of review:

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary of so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

41 USC 322 Vol. 8 Page 9507

Contract provisions making decisions final on questions of law.

No government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

RULES OF THE UNITED STATES
COURT OF CLAIMS

Rule 152. Relief from Judjment or Order (FRCP 60)

(a) Clerical Mistakes: Clerical mistakes in judgments, orders, or other parts of the record, and errors therein arising from oversight or omission, may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc; Response; Reply: On motion conforming to Rule 51 and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 151 (c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason

justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 151(a)(2). A response to a motion under this paragraph may be filed within 15 days after the motion is served. A reply may be filed within 10 days after the service of the response. (See Rul3 214(e) as to duplication and number of copies.)

STATEMENT OF THE CASE

In December 1973 petitioner filed an independent action under the rules of the United States Court of Claims as revised September 1, 1969, Rule 152 (b) clauses (4) and (6) (FRCP 60 b), maintaining that the Judgment in Ct. Cl. 231-68 was void in that it was in violation of Federal Statute 42 USC 1855 e, and that the Court had abnigated its judicial function in refusing to interpret or apply 42 USC 1855 e, and that the Court did not have jurisdiction to render a Judgment in direct violation of a Federal statute.

While maintaining that the erroneous Judgment had been rendered because of fraud on the court by the defendants, petitioner made it perfectly clear that it

was up to the Court of Claims to decide if they had been led into making a void Judgment because of fraud on the court by the defendants; and regardless of whether there was fraud on the court by the defendants, the attack was on the Judgment as being void because it had been rendered in violation of a Federal statute and the Court had no jurisdiction to render a decision in a clear violation of a Federal statute.

Petitioner informed the Court in several briefings that he was not filing suit or appealing the Judgment, but was attacking it as null and void. Petitioner sought no relief for himself other than to have Judgment voided and set aside and to have Judgment made to the real party of interest, Chris Berg, Inc.

Petitioner brought to the Court's

attention that since this was not a suit but an independent action to attack the Judgment as being null and void, that the petitioner had standing in several capacities to attack the Judgment in that the Judgment had irreparably damaged him. In spite of this the Court of Claims granted defendants' Motion to Dismiss on the basis that petitioner did not constitute the real party in interest in the dispute and it relied on Merrit v United States, 267 U.S. 338, 340-45 (1925) and Putnam Mills v United States, 202 Ct.Cl. 1, 479 F.2d 1334, 1337 (1973) both cases having to do with a subcontractor's standing to sue; not with a party's standing to attack a Judgment as illegal, null, and void as being in violation of a Federal statute, and that the Court did not have jurisdic-

tion to render such a judgment, and that the Judgment was against public policy.

The Court further concluded that the petitioner failed to describe an actionable claim of fraud under Rule 152(b).

The Court of Claims failed to come to grips with petitioner's contention that although he felt the Court had been misled into its erroneous judgment because of fraud on the court, this was not the issue. The issue was that the judgment rendered was an illegal, null, and void judgment and the Court did not have jurisdictional authority to render such a judgment, and that such judgment was against public policy and denied due process.

Petitioner's independent action was and is an attack upon the Judgment. The petitioner had and has now standing to attack the judgment as being null and void

when it has irreparably damaged him. He was the legal representative and was privy to the original suit in Ct. Cl. 231-68. Additionally, rendering of a judgment in clear violation of a Federal statute is against public policy and public interest and petitioner has standing as a citizen.

FACTS

During the March 27, 1964 earthquake in Alaska many public buildings were heavily damaged and in need of repair. The defendants (Alaska District, Corps of Engineers) were authorized by other departments of government to repair these buildings under funds authorized by 42 USC 1855 e. which states in part that the funds can be used only to repair and reconstruct to place a building into reasonably useable condition.

The 5040th Hospital at Elmendorf Air Force Base was one of these buildings. The repair work was done in three phases. Work under Phases I and II was performed by MB Contractors. The contract under which this action is involved was performed by Chris Berg, Inc. under a contract titled, Repair of Hospital, Phase III, which was awarded in the fall of 1964 and funding was obtained through 42 USC 1855 e. and made a part of the contract. The painting work, as part of the repair, was performed by Warren Painting Co., Inc. under a subcontract from Chris Berg Inc. Warren Painting Co. is a solely owned corporation, owned by Clifford E. Warren (the petitioner) and his wife June, and is their sole source of income.

By all common law and law set down by the United States Supreme Court as to the interpretation of contracts, the specifications and drawings issued with the contract for the project would have placed the hospital into not only a reasonably useable condition, but actually a condition equal to or better than it had been prior to the earthquake. When properly interpreted the specifications and drawings conformed to and complied with the restrictions of 42 USC 1855 e.

Having been authorized by various departments of government, the defendants awarded contracts and directed the performance of work on many other public buildings where contracts were awarded and the work was performed under 42 USC 1855 e. funding. The defendants

had full knowledge of the restrictions and limitations of the statute and kept within those restrictions and limitations on those contracts.

The records of Ct. Cl. 231-68 clearly show that the defendants conspired to violate the statute and did violate it by directing Warren Painting Co., through the prime contractor, to completely repaint and make like new the entire interior and exterior of the hospital, including many undamaged items and areas, and including repainting of items and areas which had been repaired (painted) under Phases I and II.

The conspiracy to violate the statute was testified to by one of the defendant's witnesses as having taken place at a conference held by the defen-

dants prior to issuing the Invitation for Bids for Phase III of the repair to the 5040th Hospital.

Chris Berg Inc. recuested a Contracting Officer's Decision on the petitioners claims, which was denied. With authority granted by Chris Berg Inc. and acting as legal representative for that company, Warren Painting Co., through its attorney, appealed the decision to the Armed Services Board of Contract Appeals and was awarded part of the claim, but the major portions were denied. As legal representative of Chris Berg Inc., and through its attorney, Dale R. Martin, Warren Painting Co. furthered the appeal to the United States Court of Claims to recover the remaining $186,807.68 of the claim. The claims involved only painting.

As had been done in the appeal to ASBCA, Warren's attorney brought to the attention of the Court of Claims the restrictions imposed by 42 USC 1855 e., as well as other common law principles as to the interpretation of contracts.

The Court of Claims refused to take judicial notice of 42 USC 1855 e. and abnigated its judicial function by refusing to interpret or apply 42 USC 1855 e. in making its judgment.

From Moore's Federal Practice, 2nd Ed., Volume 7, Page 512:

"an abnegation by the judge of his judicial function, although no actual fraud was perpetrated, may well be a 'legal' fraud by him upon the judicial institutions."

Ensminger v Powers, 2 SC 643, 27 L ed 732
Kaw Valley Drainage v Union Pacific R.R., 163 Fed 837 CCA 8th (1908)

Kelly and Another v Town of Milan, 21 Fed 868, Circ Ct. W.D. Tenn. (1884)
State ex rel City of Terre Haute v Kolsem et al., 29 NE 595, S.Ct. Indiana (1891)
Scott v Watkins, 61 Colo 244, 157 Pac 4, S.Ct. Colo (1916)

From 12A, U.S. Supreme Court Digest; Page 230:

"The meaning of a statute must in the first instance be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law making body which passed it, the sole function of the courts is to enforce it according to its terms."

Caminetti v U.S., 242 US 470, 37 S Ct 192, 61 L Ed 442

"No court has power to defeat the intent of the legislature, when couched in such clear and express words as leave no doubt whether it was the intent of the legislature."

Calder v Bull, 3 Dall 386, 1 L ed 648

The Court of Claims disregarded common law and that set down by the Supreme Court as to reading the contract as a whole and giving proper meaning to words and phrases, etc., etc. The Court further abnigated its judicial function by refusing to interpret and apply a vital provision in the contract which made the case for the plaintiff. Additionally it changed the wording of a sentence in a provision of the contract specifications to create an ambiguity where none had existed, called it a patent ambiguity, and disallowed an important portion of the claims.

The Court awarded a minor portion of the claims in the amount of $800.00 and disallowed the basic and major portions. In accepting the $800.00

Chris Berg Inc. stipulated that the right was reserved to appeal or pursue the claim further.

On the advice of his attorney that he could not afford to go further with the claim, the petitioner himself filed a timely Motion for Reconsideration to the Court of Claims, still under authority granted by Chris Berg Inc. The Motion was not accepted for the reason that petititioner was not represented by counsel.

Petitioner then vainly sought for several months to find an attorney who would file an appeal on a contingent fee basis. When one was finally found and filed as attorney of record with the Court, the Court never acknowledged his filing or acceptance as attorney of record.

Upon inquiry the petitioner was told verbally by the Clerk of the Court of Claims that the attorney had been accepted as attorney of record and that it was not necessary that they give him notice of his acceptance.

A Motion for Reconsideration Out of Time was then made but it was not accepted by the Court.

Petitioner then attempted on his own to petition for a writ of certiorari at the Supreme Court which was not accepted because of being filed out of time.

Further study by petitioner brought to his attention that the judgment made by the Court of Claims was null and void and that there is no time limit for attacking a void judgment and no

specific time limit for bringing an action for fraud on the court.

In Ct.Cl. 491-73 petitioner filed his independent action in December 1973 and received the Court of Claims decision as to his lack of standing and lack of proof of actionable fraud several days subsecuent to the July 10, 1974 date of the Order.

Petitioner believes that he has standing. He believes that the Court of Claims rendered an illegal, null, and void judgment in Ct. Cl. 231-68 and that it had no jurisdiction to render the judgment, and that the judgment is against public policy. and denied due process.

Petitioner realizes that the briefs he has presented to the Court of Claims are not as concise as if written by a professional, and that they are

rather lengthly; but if properly read t ere is no question as to petitioner's attacking the judgment in Ct. Cl. 231-68 and that he was not bringing suit. Petitioner has standing to make such an attack on the judgment rendered in Ct.Cl. 231-68.

I. CONCLUSIONS OF LAW

VOID JUDGMENT

1. The Judgment of the Court of Claims in 231-68 is null and void.

Petitioner offers the following case law which he believes sustains his position.

From U.S. Supreme Court Digest, Lawyers Ed., Volume 6, Pages 294, 295:

> o. Contracts created by or entered into under the authority of statutes are to be interpreted according to the language used in each particular case to express the obligation

assumed.
Florida C.R. Co. v Schutte,
103 US 118

q. A statute that is within the constitutional power of Congress and in force when a contract is made, is read into the contract and becomes a part of it.

Armour Packing Co. v U. S.
209 US 56, 28 S Ct 428

also:
Per Thompson, J. Ogden v. Saauders, 12 Wheat 213
Brown v Wiles, 20 How 442
Bronson v Kinzie, 1 How 311
U. S. ex rel. Von Hoffman v. Quincy, 4 Wall 535
Bulkley v U. S., 19 Wall 37
Southern Surety v Oklahoma, 241 US 582, 36 S Ct 692
Toledo D.&B.R. v Hamilton
124 US 296, 10 S Ct 546
Hendrickson v Apperson
245 US 105, 38 S Ct 44

m. Laws affecting either the construction, enforcement, or discharge of a contract, which subsist at the time and place of making the contract, and where it is to be performed, enter into and form a part of it as fully as if they had been expressly referred to or incorporated in its terms.

Farmers & M. Bank v Federal Reserve Bank, 262 US 649, 43 S Ct 661, 30 ALR 635.

e. The laws in existence when a contract is made, including those which effect its validity, construction, discharge, and enforcement, enter into the contract and form a part of it.
Connecticut Mut. L. Ins. v. Cushman, 108 US 51, 2 S.Ct. 236

From U.S. Supreme Court Digest, Lawyers Ed., Volume 6, Page 328:

dd. Where the transaction, or the contract, is declared void because not in compliance with express statutory or constitutional provisions, a court of equity cannot interpret to give validity to such transaction or contract, or any part thereof.
Hedges v Dixon County, 150 US 182, 14 S Ct 71

From U. S. Supreme Court Digest Lawyers Ed. Volume 6= § 58:

o. Whatever may be the words of a contract, it is always to be construed in the light of the law then in force and of the circumstances and condi-

tions of the parties.
McCullough v Commonwealth of Virginia, 172 US 102, 19 S Ct 134

From U. S. Supreme Court Digest, Lawyers Ed., Volume 6, Page 284:

a. It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties.
Bronson v Rodes, 7 Wall 229

From 17 Am Jur 2d, Contracts, § 257. Law as part of, and as controlling contract. Pages 654 thru 658:

It is a general rule that contracting parties are presumed to contract in reference to the existing law; indeed, they are presumed to have in mind all the existing laws relating to the contract, or to the subject matter thereof. Thus, it is commonly said that all existing applicable or relevant and valid statutes, ordinances, regulations, and settled law of the land at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein.

From Am Jur 50, Statutes, Interpretation of Statutes:

If an affirmative statute, which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even though there are no negative words, be done in any other manner, the mode prescribed by statute for the exercise of a power, must be adopted.
City Street Imp. Co. v. Pearson, 181 Cal 640, 185 P 962, 20 ALR 1317

The primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and carry such intention into effect.
US v Cooper Corp. 61 S Ct 742
US v Palmer, 3 Wheat 610
US v American Trucking, 310 US 534, 84 L ed 1345

The intention of the legislature when discovered must prevail, any rule of construction declared by previous acts to the contrary notwithstanding.
Brown v Barry, 3 Dall (US) 365

It is open to construction only where the language used in the statute requires interpretation.
Newby v Yellin, 257 Ill App 528

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity. In accordance with these rules, frequent references may be found in judicial opinions to the clear, definite, distinct, evident, exact, explicit, express, obvious, plain,

positive, simple, unambiguous, unequivocal, or unmistakable language of the statutes under consideration.

Osaka Shosen Kaisha Line v. U. S., 57 S Ct. 356
U. S. v Hill, 39 S Ct. 143
Adams Exp. Co. v Kentucky 35 S Ct 824
Helvering v New York Trust 54 S Ct 806
U. S. v American Trucking 60 S Ct. 1059, 61 S Ct 53
U. S. v Standard Brewery 40 S Ct 139
Old Colony Trust v Comm. of Int. Rev., 57 S Ct 813

From 12 Am Jur, Contracts:

§ 149. The general right to contract is subject to the limitation that the agreement must not be in violation of the Federal or State Constitutions, Federal or State statutes, some ordinance of a city or town, or some rule of the common law. At no time in the history of the common law have agreements in violation of law been regarded as valid. Individuals have never been allowed to stipulate for iniquity. The law which prohibits the end will not lend its aid in promoting the means designed to carry it

into effect. It will not promote in one form that which it declares wrong in another. The whole doctrine relating to illegal agreements is founded on a regard for the public welfare. In fact, it has been asserted that the maint-- enance of this doctrine is essential to the preservation of the state. It may therefore be said to be a fundamental principle of the law of contracts that a contract must have a lawful purpose and that transactions in violation of law cannot be made the foundation of a valid contract. Moreover, all agreements are subject to the paramount power of the sovereign.

§ 150. An agreement which discloses an intention to contravene a statute in fraud of the public or to the injury of private parties savors of a conspiracy and is visious and unenforceable. If such an intention is once found to exist the law cannot presume that the agreement is without the effect intended by the parties in order to confer upon it the quality of enforceability.

It may be said that any agreement which involves the doing of an act which is positively prohibited by the rules of the common law

or by statute is illegal.

§ 209. The maxims "ex turpi causa non oritur actio" and "ex dolo malo non oritur actio", founded as they are on sound morals, have for a long time been applied by courts in the practical administration of justice. Under the doctrine expressed in these maxims, it has been said that no court will allow itself to be made the instrument of enforcing obligations alleged to arise out of an agreement or transaction which is illegal. In other words, no action can be based on an illegal agreement. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. It has its foundation in the policy of discouraging illegal and corrupt agreements by refusing all judicial aid to the parties to them. This rule applies to any agreement which is illegal, immoral, or against public policy or prohibited by public law, and to any agreement which has for its purpose the commission of a crime or is forbidden by statute. Such agreements cannot be enforced by one party against the other, either directly by asking the court to carry them into effect

or indirectly by claiming damages or compensation for breach of them. An agreement contrary to public policy will not be enforced, though in the particular instance no actual injury may have resulted to the public and the parties thereto were not conscious that they were doing a thing which the law did not approve. It has been said that illegal agreements are void and the courts will not recognize rights as springing therefrom. Thus, it is said that agreements in violation of public policy are void.

§ 156. Where it appears that the subject matter of an agreement is intended to be used for an unlawful purpose, the court will refuse to enforce it. While it is true that a contract lawful in itself cannot be rendered unlawful by the act of a third person in converting the subject of the contract to an unlawful purpose, but nevertheless, if an agreement apparently lawful is made with the view of facilitating or encourging the unlawful act of a third person, is it unlawful.

Moreover, agreements which, though legal when standing by themselves, are merely steps intended for the accomplishment of an illegal object, will be declared illegal. If the effect of the agreement is to accomplish an unlawful purpose, however, the agreement will be declared illegal regardless of the intention of the parties. Indeed, the mere tendency of an agreement to promote unlawful acts may render it illegal as against the policy of the law. A contract should not be enforced where its performance would make the parties guilty of a crime.

§ 157. It is clear that the courts will not recognize or enforce, or hesitate to condemn, contracts resting upon an illegal consideration. Illegal consideration consists of any act or forbearance or a promise to act or forbear which is contrary to law or public policy. It is sufficient consideration to support an agreement, and an agreement founded upon it is illegal.

§ 159. An agreement which cannot be performed without

a violation of the law is illegal and void.

§ 165. The well-established general rule is that an agreement which violates a provision of the federal or a state constituion, or of a constitutional statute, or which cannot be performed without violating such a provision, is illegal and void. The same principle extends to municipal ordinances, for in this respect there is no difference between statutes and ordinances.

§ 168. It makes no difference whether the prohibition or command is expressed or implied. Even where the statute does not, in express terms, declare the act unlawful, yet if it appears, from a consideration of the terms of the legislation in question, that the legislative intent was to declare the act unlawful, an agreement involving the doing of such an act is illegal.

2. The abnigation of judicial function by the Court of Claims in refusing to interpret or apply a Federal statute which is unambiguous is against public policy.

From 17 Am Jur 2d, Contracts, Pages 541 thru 543:

§ 179 What contracts are against public policy, generally. -- In determining what contracts are against public policy, a favorite test is whether the parties have stipulated for something inhibited by the law or inimical to or inconsistent with the public welfare. An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare.

Page 545:

§ 181 Numerous acts are wrongful because they are prohibited by statute, and of course agreements which involve those acts are illegal. Illegality of contract is likewise predicated in a proper case upon illegality arising from violation of public policy or the principles of the common law.

Accordingly, as developed in succeding sections, illegal agreements include those which tend to promote immoral, criminal, or tortious acts, fraud or deception, breach of trust or contract, oppression and injustice.

From 12 Am Jur, Contracts:

§167. Liberty of contract is subject to the limitation that the agreement must not be against public policy.

It is a general rule that agreements against public policy are illegal and void. Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will not recognize or uphold any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare, to sound morality, or to civic honesty.

An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety.

§ 168. Agreements are against public policy when they tend to injustice or oppression, restraint of liberty and natural or legal right or to the obstruction of justice, or to the violation of a statute.

§ 178. Any agreement to wrong or defraud a third person or an agreement which involves a fraud on the rights or others or which has an obvious tendency to encourage fraud is illegal because contrary to public policy. Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court to enforce an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons. An agreement which is fraudulent as to third persons will not be enforced.

§ 210. Agreements and acts that are absolutely void are agreements to do an illegal act or omit a legal public duty, (or) agreements in a form forbidden by law.

Where the agreement is, in substance or in essential form, illegal, neither party can ratify it, because the wrong done is against the state and the state only can forgive it. To permit

the subsequent ratification of such agreement or to consider it the sufficient and legal basis of a subsequent promise would be a manifest inconsistency which would annul the rule and enable the parties, by an easy expedient, to evade laws based upon consideration of public policy. Under this well-settled rule it would seem that no action of the parties or their assignees can so validate an illegal agreement as to justify a court in enforcing it where its illegality appears. An attempted compromise of a claim based on such an agreement, whether before or after institution of action thereon, would be simply an act of the parties looking to the complete or partial ratification of the illegal aggrement, which could in no way affect the power of the court to refuse to allow itself to be used as the instrument for its enforcement.

§ 174. As a settled general rule, agreements or contracts against public policy are illegal and void. An agreement or contract made in violation of established public policy is not binding and will not be enforced.

Under the principles relating to the doctrine of public policy, as applied to the law of contracts,

courts of justice will not recog-- nize or uphold any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare, to sound morality, or to civic honesty. It is not necessary to have a statute to prohibit a contract which is against public policy; in such a case, public policy itself prohibits it.

The basis of the rule that contracts in contravention of public policy are not enforceable is that no one can rightfully do that which tends to injure the public or is detrimental to the public good.

§ 176. A contract which contravenes the public policy as expressed in the laws of the United States is unenforceable.

§ 179. In determining what contracts are against public policy, a favorite test is whether the parties have stipulated for something inhibited by the law or inimical to or inconsistent with the public welfare. An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with

the public welfare or safety.

> For a particular undertaking to be against public policy, actual injury need not be shown; it is enough if the potentialities for harm are present.
>
> § 185. A contract will generally be held void and unenforceable where the object of the parties is to perpetrate a fraud upon a third person or upon the public. Thus, any agreement to wrong or defraud a third person or an agreement which involves a fraud on the rights of others or which has an obvious tendency to encourage fraud is illegal because contrary to public policy. Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court to enforce an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons.

Petitioner urges the Court to review the applicable case law concerning the above.

3. The Judgment is void because the Court of Claims abnigated its judicial function and refused to interpret or apply a Federal statute and failed to take into consideration common law such as:

"existing law being a part of a contract"

Connecticut Mut. L Ins v Cushman, 2 S Ct 236
Farmers & M. Bank v Fed. Res. Bank, 43 S Ct 661
Armour Packing v U. S. 28 S Ct 428
Southern Surety v Oklahoma 36 S Ct 692
Toledo D. & B.R. v Hamilton 10 S Ct 546
Hendrickson v Apperson 38 S Ct 44

"avoiding injustice or illegality"

Hobbs v McLean, 6 S Ct 870

From 17 Am Jur 2d, § 156, A slightly different way of expressing the rule is that illegal agreements include those in violation of some

prohibitive statute, of the express rules of the common law, or of public policy.

It may be said that any agreement which involves the doing of an act which is positively prohibited by the rules of the common law or by statute is illegal.

"change of contract by construction"

Harrison v Fortlage, 16 S Ct 488
Calmar S.S. Corp. v Scott
73 S Ct 739
Memphis & L.R.R. v Southern Exp.
6 S Ct 542, 628

"Consideration of subject matter and circumstances"

McCullough v Comm. of Virginia
19 S Ct 134
Sand Filtration v Cowardin,
29 S Ct 509

"controlling effect of intention"

Bronson v Rodes, 7 Wall 229
Davison v Von Lingen, 5 S Ct 346
U.S. v Choctaw Nation,
21 S Ct 149

"practical construction by parties"

Brooklyn L.Ins. v Dutcher
45 US 269
Philadelphia W & B R Co v Trimble, 10 Wall 367

"construing as a whole, giving effect to all parts"

Green City v Quinlan, 29 S Ct 162
Burdon Central Sugar Ref. Co. v Payne, 17 S Ct 754
Brown v Spilman, 15 S Ct 245
O'Brien v Miller, 18 S Ct 140

"effect of custom"

U. S. v de la Maza Arrendondo,
6 Pet 691
U. S. v Boisdore, 11 How63
Dunlap v Dunlap, 12 Wheat 574

"meaning of language generally"

Trimble v Seattle, 35 S Ct 218
Green v Biddle, 8 Wheat 1
Calderon v Atlas SS, 18 S Ct 588
Treat v White, 21 S Ct 611

4. Petitioner quotes from 16 Am Jur 2d, Constitutional Law concerning due process:

§ 490. Due process of law as guaranteed by the 14th Amendment was defined in terms of the equal protection of the laws -- that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

§ 542. The guaranty of due process found in the 5th Amendment of the Federal Constitution declares that no person shall "be deprived of life, liberty, or property without due process of law". The 14th Amendment declares that no state shall "deprive any person of life, liberty, or property without due process of law".

§ 544. The fundamental guaranty of due process is absolute, and not merely relative.

By reason of this guaranty it has been stated as a general principle that everyone is entitled to the protection of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions

and have long been recognized under the common-law system...

Moreover, the vague contures of due process do not leave judges at large, and they may not draw on their merely personal and private motions and disregard the limits that bind them in their judicial function.

The protection extends to rights, in the broadest sense of the term. In determining whether the requirement has been observed, regard must be had to substance rather than to form, for the mere form of the proceeding cannot convert the process used into due process of law, if the necessary result is illegally to deprive a person of his property.....

§ 545. It has been said that the term "due process of law" asserts a fundamental principle of justice, rather than a specific rule of law....

If the proceeding is found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if, on the other hand, it is found to be

arbitrary, oppressive, and unjust, it may be declared to be not due process of law.

§ 551. An act which effects only, and exhausts itself upon, a particular person or his rights and privileges, and has no relation to the community in general, is rather a sentence than a law and one which condemns without a hearing.

§ 553. It has been intimated, however, that if the error is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the guaranty.

§ 554. The purpose of this clause is to exclude arbitrary power from every branch of the government.

The object of the constitutional guaranty of due process of law is to preserve personal and property rights against the arbitrary action of public officials. It has been asserted that the guaranty should be enforced even against persons assuming to act under the authority of the government.

The guaranty is violated whenever any person, by virtue of public position under the federal or state government, deprives another of any right protected by that amendment. The guaranty may be violated by unfairness or corruption of officers. Hence, it is recognized that administrative officers, when executing the provisions of a statute involving the liberty of persons, have no right to disregard the fundamental principles that inhere in due process of law.

§ 556. It is recognized that the United States cannot interfere with private rights, except for legitimate governmental pruposes. Nor can the Federal government or any agencies set up by Congress for the government of its territory, violate the guaranty of due process.

§ 569. It was a maxim of the common law that "no may should be punished without an opportunity of being heard". Hence no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up

against him, and be allowed to meet it on the law and facts and show if he can that it is unfounded. He must be given his "day in court".

§ 572. The proceeding or hearing requisite to due process must be appropriate, fair, adequate, and such as is practicable and reasonable in the particular case.

The cases proceed upon the theory that given a court of justice which has jurisdiction and acts not arbitrarily but in conformity with a general law, upon evidence,....

§ 575. Due process of law protects against arbitrary action, consequently, arbitrary action by the tribunal in the hearing of a cause or in its order violates due process. What is such arbitrary action depends upon the facts of the case, although no violation is involved in action which is merely erroneous.

The Judgment is void because of infringment on Petitioner's Constitutional rights. Petitioner has been irreparably damaged because of the actions leading to

the void Judgment and his Constitutional rights to contract and earn a living as a contractor have been impaired because if Petitioner attempted to bid and perform work in conformity with the Judgment he would be unable to obtain contracts.

Should he bid and perform work as he and others in the construction industry always have, he will be in continuous jeopardy in that an uninformed or arbitrary contracting officer might use the Court of Claims Judgment in 231-68 to direct and require work to be performed beyond the requirements of the plans and specifications as they are interpreted by the common law and as they have been interpreted by other agencies of government and contract appeal boards.

From 16 Am Jur 2d:

§ 359. Personal liberty also includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion.

§ 373. Although the term "freedom of contract" does not appear in the Constitution, the right to enter into a contract with some exceptions, is a liberty which falls within the protection of the due process clause of the 14th and 5th Amendments to the Constitution.

In general it may be said that the privilege of contracting is both a liberty and a property right.

The United States Supreme Court has stated that <u>freedom to contract is the essence of freedom from undue restraint on the right to contract</u>.

> The right of liberty of contract is inherent and inalienable. It belongs to every citizen by the law of the land; every man has the right freely to deal, or to refuse to deal, withhis fellow men.
>
> The right of pursuing an ordinary calling or trade and of acquiring, holding, and selling property embraces the right to make all proper contracts in relation thereto.
>
> § 551. An act which effects only, and exhausts itself upon, a particular person or his rights and privileges, and has no relation to the community in general, is rather a sentence than a law and one which conderns without a hearing.

5. The Court of Claims, being an inferior court, created by the Congress does not have jurisdiction to render judgments in violation of Federal statutes, public policy, common law, or to deny due process by making arbitrary decisions in

violation of constitutional rights. The Court of Claims is bound by the same principles which bind other courts of the American judicial system.

Petitioner offers the following case law relative to those restrictions:

From 50 Am Jur, Statutes:

> § 222. Federal legislation cannot be construed without regard to the implications of the dual system of government in the United States.
> A. B. Kirschbaum v Walling, 62 S Ct 1116

> § 228. As a result of constitutional provisions distributing the powers of government among three departments, the legislative, executive, and judicial, courts have no legislative authority and should avoid judicial legislation, a usurpation of legislative powers, or an entry into the legislative field. It is not within the province of a court in the course of construction of a statute to make or supervise legislation. A statute may not, under the guise

of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms. The terms of the statute may not be disregarded. To depart from the meaning expressed by the words of a statute, is to alter it, and is not construction, but legislation.
Rice v Denny Roll & Panel,
199 NC 154, 154 SE 69

§§ 230. In the construction of a statute, the general rule is that the court may write no limitations therein. As variously expressed, the statute may not be restricted, constricted, qualified, narrowed, or abridged. Hence, general words are to have a general operation where the manifest intention of the legislature affords no ground for qualifying or restraining them.
Yu Cong Eng v Trinidad,
46 S Ct 619
Herzog v Mittleman,
65 P 2d 384
Norwood Morris Plan Co v McCarthy, 4 NE 2d 450

Butte Miners v Butte,
194 P 149

From 12A, U.S. Supreme Court Digest:

Page 230:
No court has power to defeat the intent of the legislature, when couched in such clear and express words as leave no doubt whether it was the intent of the legislature.
Calder v Bull, 3 Dall 386,

Page 231:
A court may not reject a construction clearly required by statutory language, especially where a different construction purports to raise a serious constitutional question as to the role of the judiciary under the doctrine of separation of powers.
Ullman v U.S., 76 S Ct 497

6. There is no time limit for attacking a Judgment as void.

Misco Leasing v Vaughn,
450 F 2d 257
Taft v Donellan Jerome,
407 F 2d 807
Bookout v Beck, 254 F 2d 823
Austin v Smith, 312 F 2d 337
U. S. v Melichar, D.C. Wis. 1972
Ruddies v Auburn Spark Plug
261 F.Supp. 648

State v Romero, 415 P 2d 837

Judgment was vacated as void 30 years after entry:
Crosby v Bradstreet Co., C.A. 2d 1963, 312 F 2d 483, cert. denied 83 S.Ct. 1300

Delay of 22 years did not bar relief:
U. S. v Williams, D.C. Ark 1952, 109 F.Supp. 456

Laches of a party cannot cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life:
Austin v Smith (CA 2d, 1962) 312 F 2d 337

See Marquette Corp. v Priester (ED SC 1964), 234 F Supp 799, 9 FR Serv2d 60 b.29, Case 1; Ruddies v Auburn Spark Plug (SD NY 1966) 261 F Supp 648, 10 FR Serv2d 60b.26, Case 1; SEC v Dumont Corp. (SD NY 1969) 49 FRD 342, 13 FR Serv2d 4e.1, Case 1.

See also People v Miller (1930) 339 Ill 573, 579, 171 NE 672; State Bank of Prairie du Rocher v. Brown (1931) 263 Ill App 312, (The court stated, "The judgment, being void, was subject to attack by motion, irrespective of the lapse of time; hence, appellants

are not precluded, by laches, from moving to set same aside.")

In re Borek (D NJ 1960) 180 F. Supp 567 (mere passage of time cannot give validity to a void judgment).

The theory underlying the concept of a void judgment is that it is legally ineffective - a legal nullity; and may be vacated by the court which rendered it at any time.

US v Sotis (CCA7th, 1942) 131 F 2d 783, 787

US v Milana (Ed Mich 1957) 148 F Supp 152 provided notice has been given of such contemplated action, and an opportunity to be heard to the party adversely affected.

Absence of jurisdiction of a court rendering a judgment constitutes sufficient ground for its vacation by such court, not only during the term at which it is rendered, but also after such term or after expiration of a statutory limitation of time for applications to have judgments vacated. It has been held proper to exercise the authority either before or after the expiration of the time to appeal from the judgment.

Bernard v Idaho Bank & Trust,
21 Idaho 598, 123 P 481
Flowers v King, 145 NC 234,
58 SE 1074
Sunderland v Braun Packing,
86 A 126
Smead v Sutherland, 111 A 2d 335
Macario v Alaska Gastineau Mine
165 P 73

The granting of an application to open or vacate a judgment on the ground of absence of jurisdiction has been regarded as a matter of right, rather than a matter of discretion.
Goldstein v Peter Fox Sons
135 NW 180

By virtue of an express saving clause in Rule 60(b), the time limits it states are not applicable to an independent action attacking the judgment. There is no time limit on when an independent action may be brought.
In re Casco Chem. Co.,
335 F 2d 645, 652
West Virginia Oil & Gas v George E. Breece Lumber, 213 F 2d 702
Fiske v Buder, 125 F 2d 841
Dunham v 1st Nat Bk in Sioux Falls
1972, 201 NW 2d 227, 230

Provision contained in the rule requiring relief for excusable neglect to be sought within one

year that the power of the court to entertain an independent action to relieve a party from judgment, order, or proceeding was not thereby limited, was designed to preserve the traditional power of courts of equity to relieve parties from unjust judgments if warranted by equitable principles when relief by motion under this rule is barred by a one year limitation. Caputo v Globe Indem Co., D.C.Pa. 1966, 41 F.R.D. 239

II. CONCLUSIONS OF LAW

STANDING TO ATTACK JUDGMENT

Petitioner, Clifford E. Warren, whose only livelihood is derived from Warren Painting Co., Inc., which is a solely owned corporation owned by himself and his wife, acted as legal representative for Chris Berg, Inc. in Ct. Cl. 231-68. In that case the matters before the court were claims concerning painting work only which had been directed to be

performed on Contract DA 95-507-ENG-2070. The petitioner alone was adversly affected and irreparably damaged by the judgment in Ct. Cl. 231-68.

In bringing the independent action in Ct. Cl. 491-73 to attack the judgment petitioner has not brought suit but has requested a voiding of the judgment or a reversal of the judgment in favor of Chris Berg Inc. Petitioner has not sought any award to be made directly to himself.

Petitioner believes that since he was the legal representative and privy to the action in Ct. Cl. 231-68 and has been irreparably damaged by that judgment that he has a right to bring an independent action to attack the judgment as null and void.

Petitioner feels he is entitled to bring the independent action as a citizen in that the Court of Claims refused to interpret or to apply a Federal statute in arriving at the judgment, defied common law and that set down by the Supreme Court as to the interpretation of contracts, and by such arbitrary judgment denied due process and violated provisions of the Fifth and Fourteenth Amendments of the Federal Constitution.

Petitioner cites case law as follows:

From 14 Am Jur 2d, Page 808:

> § 31. Parties; who may institute proceeding.
>
> Generally, only a party to the proceeding sought to be reviewed, or a person directly affected by it, can prosecute a writ of certiorari. One who appears as an actor in a litigation or proceeding, claiming

or asserting an interest in the subject matter, is a party, although he may have failed to file a written pleading. In other words, if the petitioner for the writ is a party in substance, although not in form, he may have the writ. If a person not a party to the proceeding seeks to use the writ he must show that the decision sought to be reviewed is directed against him or his property, in the sense that the enforcement of the decision would involve special, immediate, and direct injury to his interests.

In the matter to be reviewed is one which affects the public generally, an individual citizen may ordinarily obtain the writ. The writ will issue for the redress or prevention of public wrongs by public bodies and officers whose official sphere is confined to some political division of the state, whenever the petitioner is one of the class of persons most directly affected in their enjoyment of public rights and the public convenience will be subserved by the desired remedy.

The rule (152 (b) or 60 (b)0 allows relief from a judgment to be given to "a party or his legal representative." This allows one who is in privity with a party to move under the rule.

In re Casco Chem. Co.,
C.A.5th, 1964, 335 F2d 645
Ingerton v 1st Nat Bk & Tr.
C.A. 10th, 291 F2d 662
Wright v Cty Sch. Bd.
D.C.Va. 1970, 309 F. Supp. 671

The controlling principle has been clearly stated by Chief Judge Lewis for the 10th Circuit: A 'legal representative' under the rule is one who by operation of law is tantamount to a party in relationship to the matter involved in the principal action.

Western Steel Erection v US,
C.A.10th, 1970, 424 F2d 737, 739

Blacks Law Dictionary defines:

Privies: Those who are partakers or have an interest in any action or thing, or any relation to another.

Harrington v Harrington,
3 Miss (2 How.) 701, 717

Brown v Fidelty Union Tr.
126 NJ Eq 406, 9 A 2d 311, 326
Hameli v Sejpek, 274 NYS 875, 152 Misc 799

Privy: A person who is in privity with another. One who is a partaker or has a part or interest in any action, matter, or thing.

Legal Representation: The term in its broadest sense means one who stands in place of, and represents the interests of, another.

Nudelman v Thimbles Inc.
225 Mo App 553, 40 SW 2d 475, 477
Harrey v Farmers All. Ins.
134 Kan 5, 4 P 2d 460,461

It is by no means true that the right to move for the modification or vacation of a judgment is strictly limited to parties to the action; there are cases in which the right of a person not a party to the record to have a judgment opened or vacated has been recognized. This is particularly true in the case of persons in privity with parties to the action. There are also cases in which it is declared broadly that the vacation of a particular

judgment may be obtained by any interested party or person affected by the judgment.

Withers v Miller, 140 Kan123, 34 P 2d 110
Reynolds v Lloyd Cotton Mills, 99 SE 240
Chappel v Chappel, 12 NY 215, 64 Am Dec 496
Leslie v Gibson, 103 P 115
Smith v Coucher (DC) 9 Alaska 730
Continental Gin v Arnold, 167 P 613
Weber v Weber, 140 NW 1052

It sometimes happens that out of the same transaction there arise rights both in personam and in rem. In such case, a judgment in rem does not merge the cause of action in personam on the original claim, and does not constitute a bar to an action thereon. This rule is based upon a difference not only in parties, but also in causes of action.

Taylor v Continental Supply 16 F 2d 578
Strand v Halverson, 264 NW 266
Swedish American Nat Bk. v Dickinson Co., 69 NW 455
See 3 Freeman, Judgments 5th ed., Pg 3139 § 1529.

Blacks Law Dictionary defines:

Void Judgment: One which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. Reynolds v Volunteer State Life Ins Co., Tex.Civ.App 80 SW 2d 1087, 1092. One which from its inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of confirmation, ratification, or enforcement in any manner or to any degree. Ex parte Myers, 121 Neb. 56, 236 NW 143, 144.

Every man has a right to insist that no provision of any law shall be violated so as to work peculiar harm to him.
Wheeler-Stenzel v Nat. Window Glass Jobbers, (CCA 3d) 152 F 864

The right to maintain an action for violation of the statute has been regarded as based upon the principle that duties and rights are correlative, and that where a duty is imposed, there must be a right to have

it performed.
Anno: 9 LRA(NS) 388.

An action for the violation of a statutory duty is generally maintainable by any person injured thereby, who suffers a special damage therefrom, and who is of a class entitled to take advantage of the law.
Zajkowski v American Steel & Wire (CCA 6th), 258 F 9
Conway v Monidah Trust, 132 P 26
Lepard v Michigan C.R. Co., 130 NW 668

However, the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative comment.
Atchison, T.&S.F.R. v Reesman 60 F 370
Sands v Linch, 182 SW 561

Under California law, where one person owns all stock of a corporation and uses the corporation as a mere conduit for the transaction of his own

business, the corporation is regarded as his "alter ego". Imperial Pater & Color Corp. v Sampsell, 114 F 2d 49, reversed 61 S Ct 904, 313 US 215, 85 L.Ed. 1293, rehearing denied 61 S.Ct. 1107 313 US 600, 85 L.Ed. 1552.

Corporate entity is disregarded where not to do so would defeat public convenience, work a fraud, or justify a wrong. Great Northern Co-op v Bowles 146 F 2d 269

The corporate form cannot be used to evade or defeat public policy or lawful ends of legislation, and courts will tear away the corporate veil whenever it is used to evade a statute or modify its intent. U.S. v Hudgins-Dize, 83 F. Supp. 593.

In Plaintiff's Motion to Deny Defendant's Motion to Dismiss, Ct. Cl. 491-74, plaintiff stated on Page 16:

"Again, plaintiff's Motion is not a claim or suit against the Government but is a Motion to set aside or void the judgment in Ct.Cl. 231-68.

In plaintiff's Supplement to Cross Motion to Deny Defendant's Motion to Dismiss, Ct. Cl. 491-73, plaintiff stated on Page 2:

> "Plaintiff's independent action, while labeled as fraud upon the court, is not intended to be limited to that subject only; but for any other relief indicated in FRCP 60 (b)(4) or (b)(6) or any other grounds available by independent action for the setting aside, reversing, or voiding the judgment in Ct. Cl. 231-68. Other reasons being (but not limited to) Constitutional violations and jurisdiction of the Court to render a judgment in violation of a federal statute, void judgment, and abnegation of judicial function."

In Plaintiff's Reply to Defendant's Reply Brief, Ct.Cl. 491-73, plaintiff stated on Pages 3 and 4:

> "Fraud upon the Court has only been used on the theory that the necessity for the attack on the judgment was caused by fraud on the court by the defendant. If the Court disallows the charge

of fraud upon the court, the judgment is still attacked for other reasons. Plaintiff has made this perfectly clear in his brief.

It is not necessary that the decision of the Court in this matter be based on fraud upon the court. Plaintiff's petition is grounded upon Rule 152 b. which is the same as FRCP 60 b. which states, "any other reason justifying relief from the operation of a judgment'; and on the savings clause which states, "This rule does not limit the power of the Court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court."

Plaintiff repeats <u>again</u>, <u>again</u>, and <u>again</u>, that this independent action is not based only on fraud upon the court.

The citations on pages 7, 54, and 55 of Plaintiff's Supplement to Cross Motion to Deny Defendant's Motion to Dismiss for the labeling of the papers of the action does not confine the Court to other relief for other reasons. Plaintiff can only state again that this is an independant action for the <u>setting aside</u>, <u>reversing</u>, or <u>voiding</u> of the judgment, and

> is not, is not, is not, a "suit" against the government."

And on Page 8:

> "Plaintiff cannot see why defendant cannot understand that plaintiff's independent action is not based solely on fraud upon the court."

In plaintiff's Supplement to Cross Motion to Deny Defendant's Motion to Dismiss, Ct. Cl. 491-73, plaintiff stated on Pages 6 and 7:

> "In using fraud upon the court as a basis for the setting aside or reversing or voiding judgment on Ct.Cl. 231-68 the independent action was predicated on the opinion that such an erroneous and illegal judgment was caused by fraud upon the Court of Claims (a court of law, not equity) by the defendant. This was not intended to restrict the action from asserting other reasons for the setting aside, reversing, or voiding of the judgment. The label attached to such a motion does not restrict the Court from granting relief under the Court of Claims Rule 152 or FRCP 60 or by independent action for other reasons.

Plaintiff brings to the attention of the Court that he is not bound by any label on his motion for voiding, reversing, or setting aside judgment on Ct.Cl. 231-68, and he seeks relief for any cause the Court deems appropriate."

Plaintiff then cited as follows:

When an adverse party is not prejudiced, an independent action for relief from judgment may be treated as a motion for relief, and conversely a motion for relief may be treated as the institution of an independent action.

Bankers Mortgage v U.S., C.A.5th 1970, 423 F 2d 73, cert denied 90 S.Ct. 2242, 399 US 927, 26 L.Ed.2d 793

And on Pages 54 and 55 plaintiff stated:

While fraud on the court is one basis for voiding or setting aside of judgment, in Ct.Cl. 231-68 there are other bases for relief and plaintiff has not limited himself to any one of them.

On Page 407 of Moore's Federal Practice 2nd Ed., Vol. 7, it is stated:

The mislabelling of a paper or a proceeding to obtain relief from a judgment is unimportant where the adverse party is not prejudiced; and the initiating paper may be treated as a motion for relief under 60 (b).

In re Estate of Cremidas (D Alaska 1953) 14 FRD 15, 18 FR Serv 60 b. 29, Case 3. (Petition for writ of coram nobis, which had been abolished treated as a motion under 60 (b); US v Wissahickon Tool Works (CA2d 1952) 200 F 2d 936, 18 FR Serv 58.5, Case 1 (untimely motion made under Rule 59 treated as a motion under 60 (b); Sebastiano v US (ND Ohio 1951 103 F Supp 278, 15 FR Serv 60b.29, Case 2 (independent action treated as a motion for relief under 60(b)(6) aff'd (CA6th, 1952) 195 F2d 184.

For related discussion and further citation see 60.18(8) nn 5,6; 60.27(1) n 32; and 60.38(3) in the same authority.

III COURT MAY ENTERTAIN ITS OWN MOTIONS

On Page 13 of Plaintiff's Supplement to Cross Motion to Deny Defendant's Motion to Dismiss, Ct. Cl. 491-73, plain-

tiff brought to the attention of the Court that it could entertain its own motion and that it was not necessary to entertain an objection from defendants. The following case law was cited:

> The court has power to act in the interest of justice in an unusual case in which its attention has been directed to the necessity for relief by means other than a motion.
>
> McDowell v Celebrezze, C.A.5th, 1962, 310 F 2d 43

> Although a party may bring the matter to the attention of the court, this is not essential, and the court may proceed on its own motion.
>
> Universal Oil Prods. v Root Ref. 1946, 66 S.Ct. 1176, 328 US 575
>
> Root Ref. v Universal Oil Prods. CCA3d, 1948, 169 F 2d 514, 521-523, cert den. 69 S Ct 481, 335 US 912.
>
> Martina Theatre v Schine Chain C.A.2d, 1960, 278 F 2d 798
>
> Kupferman v Conso. Research C.A.2d, 1972, 459 F 2d 1072

> There is no rigid time limitation when the court acts on its own

motion.

Root Refining v Universal Oil Prod.
CCA3d, 1948, 169 F 2d 514, 541

CONCLUSION

To say the least the present case, Ct. Cl. 491-73 and the Judgment rendered in Ct. Cl. 231-68 are unusual.

The judgment rendered in Ct. Cl. 231-68 was arrived at by an abnigation of judicial function in the Court's refusal to interpret or apply a Federal statute, apply common law of contract interpretation, refusal to interpret a provision in the specifications in favor of the plaintiff, and rewording of a sentence to create a patent ambiguity where none had existed; all leading to transforming a legal contract into an illegal contract. This illegal, void, and arbitrary judgment was against public policy and a denial of due process.

Proof of the foregoing is contained in the Court records of Ct. Cl. 231-68 and Ct.Cl. 491-73.

Petitioner is the only one harmed or irreparably damaged by the Judgment and he has standing to attack the judgment as outlined in this petition Petitioner re-emphasizes that he is not entering suit, but is attacking a judgment as null and void and seeking any appropriate relief available.

Under Ct. Cl. Rule 152 (b) and FRCP 60 (b), in particular (b)(4) and (b)(6), petitioner has sought relief within his capabilities and means from the void judgment rendered in Ct.Cl. 231-68 but has been thwarted in every effort to have the case reviewed.

It is, of course, obvious to

the honorable Court that petitioner is a layman who perhaps has made legal and technical errors in filing this petition. He hopes he has not, but should he have he respectfully requests the Court's indulgence and its consideration of the following case law:

> "The Federal Rules of Civil Procedure are designed in large part to get away from some of the old procedural boobytraps which common law pleaders could set to prevent unsophisticated litigants from ever having their day in court. Rules of Civil Procedure not only permit, but should as nearly as possible guarantee, that bonafide complaints be carried to an adjudication on the merits."
>
> Surowitz v Hilton Hotels, 383 US 363, 86 S Ct 845

WHEREFORE petitioner prays that the Supreme Court of the United States will grant this petition for writ of certiorari and further grant relief by:

1. Setting aside the Order in Ct.Cl. 491-73 granting defendant's Motion to Dismiss because of plaintiff's lack of standing.

2. Ordering the United States Court of Claims to give petitioner standing in Ct.Cl. 491-73, or

3. That the Honorable Supreme Court will grant petitioner's Motion or entertain its own Motion to void, set aside, or reverse the judgment in Ct.Cl. 231-68.

4. Granting any further relief deemed appropriate by the Court.

Respectfully submitted,

Clifford E. Warren

Clifford E. Warren
Petitioner
Pro se

Ken Wray's Print Shop, Inc.
Anchorage, Alaska

IN THE UNITED STATES COURT OF CLAIMS

No. 491-73

CLIFFORD E. WARREN

v.

THE UNITED STATES

Before DAVIS, Judge, Presiding, KUNZIG and BENNETT, Judges.

O R D E R

This "independent action" under Rule 152(b) to set aside the decision in Chris Berg, Inc. v. United States, 197 Ct.Cl. 503, 455 F.2d 1037 (1972), on the basis that it was fraudulently arrived at, comes before the court on defendant's motion to dismiss the petition. Upon consideration of the briefs and without oral argument, the court concludes that the motion should be granted since plaintiff does not constitute the "real party in interest" to this dispute. Merritt v. United States, 267 U.S. 338, 340-41 (1925); Putnam Mills Corp. v. United States, 202 Ct.Cl. 1, ___, 479 F.2d 1334, 1337 (1973). The court further concludes that, in any case, plaintiff's petition fails to describe an actionable claim of fraud under Rule 152(b).

IT IS THEREFORE ORDERED that defendant's motion to dismiss be and the same is granted and the petition is dismissed.

BY THE COURT

JUL 10 1974

Oscar H. Davis
Judge, Presiding

In the United States Court of Claims

No. 231-68

(Decided February 18, 1972)

CHRIS BERG, INC. v. THE UNITED STATES

Dale R. Martin, attorney of record, for plaintiff.

Ray Goddard, with whom was *Assistant Attorney General L. Patrick Gray, III*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, DAVIS, COLLINS, SKELTON, NICHOLS, and KASHIWA, *Judges*.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

PER CURIAM: This case was referred to Trial Commissioner Joseph V. Colaianni with directions to prepare and file his opinion on the issues of plaintiff's motion and defendant's cross-motion for summary judgment under the order of reference and Rule 166(c). The commissioner has done so in an opinion and report filed on March 10, 1971, wherein such facts as are necessary to the opinion are set forth. A request for review of the commissioner's opinion and recommendations was filed by plaintiff, defendant urged the court to adopt the commissioner's opinion and the case has been submitted to the court on oral argument of counsel and the briefs of the parties. Since the court agrees with the opinion and recommended conclusions of the trial commissioner, it hereby adopts the same as hereinafter set forth as the basis for its judgment in this case. Therefore, as to Claims I and III plaintiff's motion for summary judgment is denied, de-

fendant's cross-motion is granted and the petition is dismissed. As to Claim II, with respect to the painting of one stairway and certain N.I.C. areas, plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. Further proceedings as to this claim are stayed pursuant to Rule 167 for a period of 90 days to afford the parties an opportunity to obtain an agency resolution of the amount of equitable adjustment to which plaintiff is entitled.

OPINION OF COMMISSIONER

COLAIANNI, *Commissioner:* Plaintiff's claims arise out of a January 12, 1965, contract with the Corps of Engineers for the repair of earthquake caused damage to a hospital at Elmendorf Air Force Base in Alaska. The claims are made and presented for and on behalf of Warren Painting Company Inc. of Anchorage, Alaska, plaintiff's subcontractor.

Background Facts

On March 27, 1964, portions of Alaska were heavily damaged by a severe earthquake. The multi-story, 400-bed Air Force Base Hospital, outside of Anchorage, Alaska, was among the buildings that suffered extensive damage. The damage was of such a nature and severity that it was necessary to completely deactivate the hospital.

To enable repairs to be made to the hospital, and other Alaskan facilities, emergency funds were made available by the United States Government pursuant to Title 42 U.S.C. § 1855e. Because of the necessity that the hospital be reactivated as quickly as possible, a three-phase repair and restoration program, under the auspices of the Alaska District of the Corps of Engineers, United States Army Engineers, was decided upon.

A contract to conduct Phase I repair and restoration work was negotiated between the United States Army Corps of Engineers and M-B Contracting Company. The Phase I work concentrated on the critical areas that needed immediate attention to enable the most basic of hospital services to be performed. The work on Phase I commenced shortly after the earthquake and continued through May 15, 1964.

The Phase II repair and restoration contract was also awarded to M-B Contracting Company, and work under this

contract commenced immediately after termination of Phase I work and continued until late December 1964. The repair and restoration work under Phase II also concentrated on the more essential and critical areas of the hospital.

The emergency repairs conducted during Phases I and II were not only generally limited to the most critical of areas in the hospital, but were also substantially of an incomplete or temporary nature.

Furthermore, while the Phase I and II contracts were primarily concerned with structural type repairs, the testimony shows that painting to select areas also occurred. There is no dispute that during April and early May 1964, clinical laboratory areas, obstetric delivery areas, and surgical areas were given a touch-up and one finish coat of paint. Similarly, there is no question that just prior to Christmas day 1964, during the Phase II contract, the main lobby of the hospital was painted in anticipation of holiday visitations.

The claims with which we are here concerned arose out of contract No. DA 95-507-ENG-2070, awarded to plaintiff for interior and exterior repair and rehabilitation work to be performed during Phase III. The $1,044,786[1] contract included an estimate of $129,500 for the painting called for by the contract. This painting estimate was based on the low job basis bid of Warren Painting Company, Inc. (hereinafter referred to as Warren) for Item 21 of the unit price schedule. In turn, Warren's bid[2] breaks down into estimates of $113,000 for painting of the interior,[3] and $16,500 for painting of the exterior.

Plaintiff seeks equitable adjustments, by way of a standard "Disputes" clause in the contract, for increased costs allegedly occasioned by constructive changes.

Plaintiff originally requested a contracting officer's decision with respect to five claims of compensation for extra painting work performed on the Elmendorf Base Hospital. Four of

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[1] By subsequent modifications the amount was increased to $1,569,999.67.

[2] Warren did not make a pre-award site investigation, and its bid was not based on its own review of the plans and specifications. Rather it relied on the calculations of a "professional quantity seller" to establish the area of coverage called for by the plans and specifications.

[3] As a result of contract modifications, and the Board's equitable adjustment for the stripping of interior surfaces, the final cost for the painting of the interior comes to $169,316.63.

plaintiff's claims were denied by the contracting officer's decision of February 14, 1966. However, plaintiff's fifth cause of action, which sought an equitable adjustment to the contract price for the cost of painting built-in metal cabinets, was not decided since the parties were attempting to settle it through negotiations. By way of Modification No. 49 to the contract, the parties on June 29, 1966, agreed to a contract increase of $11,800.26 for painting of the prefinished items covered by plaintiff's fifth cause of action. On appeal, the Armed Services Board of Contract Appeals (hereinafter referred to as Board) denied three of plaintiff's remaining four claims, but sustained plaintiff's claim of $35,092.45 for extra labor and material costs incurred for stippling of interior walls and ceilings.[4]

Plaintiff seeks review of the Board's adverse determinations, urging that the Board committed reversible errors both in its findings of fact and conclusions of law. In this instance, the issues are presented by cross-motions for summary judgment and must be resolved in accordance with Wunderlich Act standards.[5]

The separate and distinct claims for equitable adjustments which plaintiff wants this court to review are:

(I) The Board's determination that the application of a fill-coat and finish coat on the entire building exterior was a contract requirement;

(II) The Board's determination that additional work on the interior of the building was a contract requirement; and

(III) The Board's factual determination that plaintiff was not subjected to excessive workmanship standards.

The basis for each of plaintiff's claims is the "Changes" clause of the contract. The Board in denying each of the above listed claims, held that the work required of plaintiff, to both the interior and exterior, was clearly called for by the contract, and that the standards of the workmanship to which plaintiff's subcontractor was held did not substantially exceed those warranted by the contract.

Each of plaintiff's three claims are herein discussed separately.

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[4] ASBCA No. 11426, 67-2 BCA ¶ 6568.

[5] 68 Stat. 81, 41 U.S.C. §§ 321-22 (1964).

CLAIM I

Contract Requirements Relating to Exterior Concrete and Masonry Surfaces

The exterior of the multi-floor Elmendorf Hospital was constructed of steel reinforced monolithic concrete columns and beams and concrete masonry units of monolithic concrete or concrete blocks. The concrete columns and beams sustained extensive damage ranging from gaping fissures to thousands of lineal feet of hairline cracks. Similarly the concrete masonry units were also extensively damaged. Numerous panels had to be replaced either partially or in their entirety, and substantially all were damaged by cracks.

From the outset the parties did not agree that the contract required the subcontractor to apply a cement-latex-filler coat and one final coat to the entire exterior of the hospital. Based on a multipronged argument, plaintiff contends that a latex-filler coat, the surface preparation, and a final finish coat were to be applied only to those exterior surfaces of the hospital which were repaired.[6]

On the other hand, defendant contends that the contract required the application of a latex-filler coat surface preparation to the entire hospital exterior. Defendant also contends, that the contract required the application of a finish coat of paint to the entire hospital exterior.

At the root of this cause of action is the familiar question of interpretation of contract specifications. This court has over the years consistently held the interpretation of contract specifications to be a question of law. Accordingly, the Board's prior decision is not entitled to finality,[7] but is open to judicial review by this court.[8] The contract provisions considered by the parties and the Board as being most relevant to this cause of action are embodied in Section 10 of the Technical Provisions.

---

[6] However, at least one of plaintiff's witnesses testified that the contract called for the application of a filler coat and finish coat of paint to the entire hospital exterior. Also several paint contractors who bid on the contract testified that in their opinion the contract called for an application of a latex-filler coat and one final coat of paint to the entire exterior of the hospital.

[7] Sec. 5, *supra*, 41 U.S.C. § 322 (1964).

[8] *Morrison-Knudsen Co. v. United States*, 184 Ct. Cl. 661, 684, 397 F. 2d 826, 840-841 (1968).

Paragraph 10-01 "SCOPE:" provides:

> This section covers the painting for building construction that is itemized hereinafter under SURFACES TO BE PAINTED and that is not specified in other sections.

The portion of paragraph 10-06*b*. "CLEANING AND PREPARATION OF SURFACES:" which is pertinent to the question now being considered provides:

> *Concrete and masonry surfaces* to be painted shall be prepared by removing * * * old weathered paint, and by roughening to remove glaze. * * * Cement-latex filler coat shall be applied to all exterior concrete and masonry surfaces.

In pertinent part, paragraph 10-08 "SURFACES TO BE PAINTED:" provides as follows:

> *a. General:* Except as specified under SURFACES NOT TO BE PAINTED, all existing and new surfaces shall be painted. Existing surfaces shall be cleaned of all dirt, grease, etc. and shall be painted one coat of the final coat of paint required in the Painting Schedule for the particular surface. Existing and new unpainted surfaces to be painted, shall receive the surface preparation and treatment and the number and types of coatings specified. * * *
>
> * * * * *
>
> *b. Painting Schedule:*

No.	Surface	Surface preparation and pretreatment	1st Coat	2nd Coat	3rd Coat
1	Exterior monolithic concrete, and concrete masonry unit surfaces (except glass).	Remove all foreign matter, efflorescence and loose particles, and roughen glazed surfaces.	Cement-latex filler coat.	Exterior latex.	(None)

* * * * *

Finally, paragraph 10-09 "SURFACES NOT TO BE PAINTED:" lists the surfaces of the hospital exterior which were excepted from the contract painting requirements, and provides in pertinent part:

> *a. Exterior Surfaces:*
> (1) Concrete walking surfaces
> (2) Aluminum
>
> * * * * *

Basic to plaintiff's position concerning the painting work required by the contract, is its emphasis that we are concerned with a contract which is fundamentally dedicated to the repair of the Elmendorf Hospital. In support of its position, plaintiff points out that the contract was funded from federal emergency appropriations authorized by Title 42 U.S.C. § 1855c. With the above as its foundation, plaintiff unconvincingly argues that the areas to be painted must bear some relationship to the need for repairs. This is necessary, plaintiff contends, since there was no expectation or intent that anything should be done to undamaged and previously repaired surfaces, for by definition one cannot repair that which is not damaged.

These contentions by plaintiff have the unconvincing ring of typical "hindsight" or "after thought" type arguments, conceived long after the contract with which we were concerned was executed, and appear to have no foundation in fact.

Equally unmeritorious was plaintiff's argument that the drawings were the only portion of the contract that indicated "where to paint," and the specifications, on the other hand, disclose "how to paint."

We agree with the conclusion reached by the Board which summarily dismissed this argument with the following statement (67-2 BCA ¶ 6568, p. 30, 475):

> It is true that generally speaking this as a contract for repairs and one of the work items is painting and in that sense painting is an item of repair. The drawings, however, on which so much reliance is placed, do not purport to show where THAT work is to be done although they show in great detail where other work is to be done. * * *
>
> * * * * *

Further underscoring the weakness of plaintiff's argument are the following contract examples where the work requirements are shown in the drawings:

(1) SECTION 14 BITUMINOUS PRIME COAT: paragraph 14-02A "EXISTING PAVEMENT:" Existing pavement shall be *removed as shown in the contract drawings.* * * * [Emphasis added.]

(2) SECTION 1 CONCRETE: paragraph 1-04 "RE-

MOVAL WORK:" Existing concrete shall be *removed where indicated on the drawings.* * * * [Emphasis added.]

(3) SECTION 6 LUMBER AND INSULATION: paragraph 6-07*b*. *Installation:* Lumber shall be installed wherever existing lumber is required to be removed. Installation shall conform to the *details indicated on the drawings.* [Emphasis added.]

Contrasting these examples with the language of TP 10-01, we have no doubt that the specifications and not the drawings were intended to tell the contractor "where to paint" as well as "how to paint."

In a considerably more substantial argument, plaintiff points out that the Board conceded that "This record does furnish support for the appellant's contention that a filler coat is intended to fill voids in new masonry and is inappropriate for painted surfaces * * *."[9] Accordingly, plaintiff argues that unless its interpretation of the contract is followed, it will be forced to perform a useless and needless task. Albeit for reasons importantly different from those of the Board, we conclude, as did the Board, that the contract specifications required the application of a latex-filler coat and a finish coat to the entire exterior of the hospital. The basis for our conclusion follows.

The Government, with whom the Board agreed, pointed out that TP 10-08*a*. required the application of the filler coat to all exterior concrete and masonry surfaces. The Board, in support of this interpretation, relied upon the last sentence of Technical Provision 10-06*b*., which provides:

> * * * Cement-latex filler coat shall be applied to all exterior concrete and masonry surfaces.

After a reading of TP 10-08*a*., we agree with the Board's observation that it lacks artistry in its expression. However, even more important, a reading of TP 10-08*a*. and the last sentence of TP 10-06*b*., highlights the existence of a serious inconsistency on the face of the contract. The second sentence of TP 10-08*a*. requires the application of one coat of the final coat of paint to *all existing surfaces.* Yet, the very next sentence of that same provision requires that *existing* sur-

[9] N. 4, *supra*, at 30,476.

faces and *new* unpainted surfaces to be painted shall receive the surface preparation and number of coats specified in TP 10-08*b*. If Technical Provision 10-08*a*. is to be internally consistent, either the existing surfaces spoken of in the two sentences are different, or the existing surfaces are the same and the number of coats specified, which is the language of sentence three, refers to the specific requirement in sentence two that these surfaces are only to receive one final coat of paint.

A review of the contract precludes the possibility that the term "existing surfaces" in these two sentences refers to different surfaces. Therefore, the only reasonable interpretation is the latter one. However, this analysis necessarily leads to the unavoidable and clear conclusion that TP 10-08*a*. is in direct conflict with the last sentence of TP 10-06*b*., which requires the application of a filler coat to the entire hospital exterior. We thus cannot agree with the Board's characterization that TP 10-08*a*. is merely redundant, but rather are forced to conclude that it is clearly ambiguous when read in light of TP 10-06*b*.

The rule has long been established that a provision in a contract which is unclear, and capable of being interpreted in at least two reasonable ways, is ambiguous. *Sun Shipbuilding and Dry Dock Co.* v. *United States*, 183 Ct. Cl. 338, 347, 393 F. 2d 807, 815–816 (1968); *Bonar* v. *United States*, 178 Ct. Cl. 61, 64, 371 F. 2d 859, 861 (1967).

When Technical Provision 10-08*a*. is read, as plaintiff urges us to do, with an eye on the purpose of the entire contract, and by also taking into consideration the questionable use of a surface preparation over previously painted surfaces, plaintiff's interpretation of the contract is reasonable. On the other hand, defendant's interpretation avoids a direct conflict between TP 10-08*a*. and TP 10-06*b*., and, at the same time, agrees with the interpretation of at least one of plaintiff's own witnesses. Therefore, defendant's interpretation is also a reasonable one. Hence, we conclude that a substantial and reasonable ambiguity exists in this contract.[1]

Ordinarily, if an ambiguity cannot be cleared up by reading the contract as a whole or looking to the circumstances

[1] *Seattle Construction Co.* v. *United States*, 176 Ct. Cl. 1339, 364 F. 2d 419 (1966).

attending the transaction and the conduct of the parties, the ambiguity should be resolved against the party who drafted the contract.[11] However, we have in the past cautioned against resolving an ambiguity against the drafter of the contract if the ambiguity is so patent and glaring that the contractor was obligated to seek clarification. *See J. A. Jones Constr. Co. v. United States*, 184 Ct. Cl. 1, 11–13, 395 F. 2d 783, 789–790 (1968). *See also Jefferson Constr. Co. v. United States*, 176 Ct. Cl. 1363, 364 F. 2d 420 (1966), where this court went beyond a mere finding of ambiguity in a contract, and considered if a contractor has in certain circumstances a duty to seek clarification of interpretative problems. In concluding that the contractor is in some instances under such a duty, we stated at pages 1368–69, 364 F. 2d at 423:

> * * * While ambiguous contract provisions are construed against the author (*Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390 (1947)), and a contractor is not usually obligated to seek clarification of all interpretative problems inhering in the contract terms, he must nevertheless inquire where the discrepancy, omission or conflict is obvious (*Consolidated Eng'r. Co. v. United States*, 98 Ct. Cl. 256, 280 (1943); *Jefferson Construction Co. v. United States*, 151 Ct. Cl. 75, 89–91 (1960)), and most particularly so when a specification provision affirmatively warns him of such possible discrepancies in the plans (*WPC Enterprises Inc. v. United States*, 163 Ct. Cl. 1, 6, 323 F. 2d 874, 876 (1963), and collated authorities), or where a contract article requires him to submit detected discrepancies to the contracting officer for decision (*Beacon Construction Co. v. United States*, 161 Ct. Cl. 1, 6, 314 F. 2d 501, 504 (1963)). * * *

In the contract at bar, the conflict between Technical Provisions 1[illegible] and 10-06*b*, is not what has been referred to in the past as "obscure in nature,"[12] but can be more accurately referred to as one which would have been "obvious"[13]

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[11] For [illegible] *contra proferentum*. *See, for example, Teton Corp. v. United States*, [illegible] 411 F. 2d 1262 (1969); *WPC Enterprises, Inc. v. United States*, [illegible] 323 F. 2d 874 (1963); *Peter Kiewit Sons' Co. v. United States*, [illegible] (1947).

[12] *Technical Equipment Corp. v. United States*, 174 Ct. Cl. 398, 407, 356 F. 2d 505, 510–11 (1966).

[13] *Allied [illegible] Corp., Inc. v. United States*, 180 Ct. Cl. 1057, 1064, 381 F. 2d 995, [illegible] (1967).

to any reasonable contractor experienced in the painting trade. Indeed, a concurrent reading of both TP 10-06*b*. and TP 10-08*a*. underscores and spotlights the patent and glaring incompatability of the two provisions, and under these circumstances plaintiff had the burden to seek clarification of the contract ambiguity. *See L. Rosenman Corp.* v. *United States*, 182 Ct. Cl. 586, 590, 390 F. 2d 711, 713–714 (1968). We need not go on to establish if plaintiff actually knew of the obvious conflict, since it is not the actual knowledge of the contractor, but the obviousness of the discrepancy which imposes the duty of inquiry. *J. A. Jones Constr. Corp. v. United States*, *supra*.

Further warning to the plaintiff was provided by General Provision No. 2 of the contract, which cautioned: "In case of discrepancy either in figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer * * *." This provision further warned that "Any adjustment by the Contractor without such a determination shall be at his own risk and expense." In *HRH Constr. Corp.* v. *United States*, 192 Ct. Cl. 912, 920, 428 F. 2d 1267, 1272–1273 (1970), a case having striking similarity to the one at bar, this court dealt with a contract having a similar type of provision, and unhesitatingly set forth the consequences which face a contractor who chooses to proceed in the performance of a contract which contains a patent ambiguity. Particularly, this court at page 920, 428 F. 2d at 1272 stated:

> Had the obvious omission timely been brought to defendant's attention, the dispute now in litigation would have come to light, and would have been appropriately resolved prior to the submission of bids. Having bridged the gap in its own favor without consulting the contracting officer prior to bidding, however, plaintiff is not entitled to recover here.

The obvious contract inconsistency concerning the application of the filler coat to either the entire hospital exterior (TP 10-06*b*.) or only to repaired, unpainted surfaces (TP 10-08*a*.) was so glaring that plaintiff should have sought clarification. Having failed to inquire, plaintiff cannot now "bridge the crevasse in his own favor." *Beacon Constr. Co.* v. *United States*, 161 Ct. Cl. 1, 314 F. 2d 501 (1963); *see also*

J. A. Jones Constr. Co. v. *United States*, *supra*. Accordingly, plaintiff's claim for additional compensation for the application of the cement-latex filler, to the entire exterior concrete and masonry surfaces is denied. The decision of the Board as to its ultimate determination on this issue is affirmed.

Turning now to the second part of CLAIM I, we consider whether plaintiff was required by the contract to place a final coat of paint over the entire exterior concrete and masonry surfaces. The Board found that Technical Provision 10-08*a* was concerned with this facet of the job and its language eminently clear in its directive that "Existing surfaces * * * shall be painted one coat of the final coat of paint * * *." We agree.

Plaintiff does not argue that TP 10-08*a*. is unclear or in conflict with other contract provisions regarding the requirement that it put one final coat of paint over the entire hospital exterior. Rather, plaintiff argues, since the contract was one for repair of the hospital, that no painting should be required to areas which were not damaged by the earthquake. We do not feel that such an interpretation of TP 10-08*a*. is a reasonable one. Indeed, to do as plaintiff urges would necessitate ignoring the clear directive of TP 10-08*a*., and, of the contract as a whole. "Contracts are not necessarily rendered ambiguous by the mere fact that the parties disagree as to their meaning. There must be a reasonable uncertainty of meaning." *Southern Constr. Co.* v. *United States*, *supra*, n. 10, 176 Ct. Cl. at 1361, 364 F. 2d at 452–453. No such uncertainty exists here. For the foregoing reason, the decision of the Board concerning the application of one coat of paint to the entire exterior of the hospital is affirmed.

CLAIM II

Contract Requirements Relating to Interior of the Hospital

While the testimony is not clear as to the amount of damage caused by the earthquake to the interior of the hospital, there is no dispute that at the beginning of Phase III the hospital interior could be grouped into the following categories:

(a) areas that had been previously repainted during Phases I and II;

(b) areas that were neither damaged by the earthquake, nor repaired during Phases I, II or III;
(c) areas that had not been painted prior to the earthquake; and
(d) areas specifically excluded from the Phase III contract and designated N.I.C. (Not In Contract) on the drawings.

There also appears to be no doubt that the parties practically from the initiation of the Phase III contract were unable to agree as to the painting required thereunder to the interior of the hospital. A dispute concerning the work required by the contract culminated in the issuance of the following directive by the contracting officer:

> My decision is that you are to paint as a contract requirement all areas, surfaces, and items of the interior of the 5040th Hospital excepting areas indicated as N.I.C. (Not In Contract), and concrete walking surfaces, stairs, and platforms except those already painted. elevator shafts, new acoustical tile units, prefinished surfaces such as ceramic tile and vinyl wall covering, pipe trenches, pipe shafts, cork and asphalt tile. [Item 17, Rule 4 Documents.]

A subsequent directive ordered plaintiff's subcontractor to paint N.R.R. (No Repairs Required) areas.[14]

As a result of these directives, and subsequent oral and written orders, plaintiff alleges that it was required to paint the entire interior of the hospital. Accordingly, plaintiff urges that its subcontractor was forced to do extra work, beyond that called for by the contract, and therefore an equitable adjustment in the contract price to compensate for the extra work is warranted. Plaintiff's claim for an equitable adjustment has been denied by both the contracting officer and the Board.

Plaintiff in its second cause of action appeals the Board's decision denying its claim for an equitable adjustment and urges that the Board "* * * erred in concluding that the contract required painting of the entire interior hospital structure, including previously repaired and painted areas; undamaged areas; areas that never had been previously painted; and areas specifically excluded from the contract."

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[14] Plaintiff feebly attempts to include the N.R.R. areas into Item 8 of TP 10-005, but unconvincingly fails to develop the argument.

This claim, similar to CLAIM I, fundamentally arises from a conflict in the interpretation of a contract provision, and is a question of law. Accordingly, as we explained in connection with CLAIM I, the decision of the Board concerning this claim is subject to a full judicial review.[15]

We are again called upon to determine, although in a different context, the meaning of TP 10-08*a*. It will be recalled that TP 10-08*a*. was quoted in pertinent part hereinabove, and required the painting of all new and existing surfaces except those specified under "SURFACES NOT TO BE PAINTED."

Technical Provision 10-09 "SURFACES NOT TO BE PAINTED" states in pertinent part, that:

> The following listed items will not require painting:
>
> *b. Interior Surfaces:*
>
> (1) Concrete walking surfaces
> (2) Stairs and platforms except those already painted
> (3) Elevator shafts
> (4) New acoustical tile units and prefinished surfaces, such as ceramic tile, etc.
> (5) Pipe trenches
> (6) Pipe shafts
> (7) Cork tile floors
> (8) Areas scheduled on the drawings as unfinished.

We will now consider each of the areas of categories (a) through (d) individually to determine for ourselves if the Board's rejection of plaintiff's claim for an equitable adjustment was correct.

Category (a) Areas

Plaintiff, urges, once again, as it did in connection with CLAIM I, that the true intent and purpose of this contract can only be reached if its repair nature is not forgotten. Plaintiff contends that to the extent that the contracting officer's directives and the Board's decision required it to paint areas that had been previously repainted during Phase I or II, it was ordered to do work which was outside of the work requirements of the contract and therefore it is entitled to an equitable adjustment.

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[15] See n. 5, *supra*

We, accordingly, must decide whether category (a) areas were properly found to be within the work requirements of this contract.[14] While the actual number of rooms painted during either Phase I or II has never been clearly established, the testimony does show that the following painting occurred:

(a) Phase I Painting—(In April and early May 1964)
  (1) clinical laboratory areas,
  (2) obstetric areas, and
  (3) surgical areas.
(b) Phase II Painting—(December 1964)
  (1) Main lobby of hospital

Plaintiff argues that no evidence was introduced to show that the parties intended to have areas which were painted during Phases I and II repainted during Phase III operations. Quite to the contrary, plaintiff urges, the testimony shows that certain of the previously repaired areas were deleted by defendant, without a credit being sought. Plaintiff would have us interpret this as proof positive that defendant was not contractually entitled to have these previously repainted areas worked upon once more in Phase III.

The testimony to which plaintiff refers for support of its contention, if anything, cuts the other way. As we view the testimony, the painting that was deleted was done by change orders at the hospital's request and for its convenience.

Further, the testimony shows that since the painting of Phases I and II a considerable amount of construction work had occurred, and the previously painted areas were subjected to unusual amounts of dust and dirt. Also, since the areas that had been repainted were in most instances the only hospital areas in operation, and since the hospital was limping along under emergency conditions, these repainted areas were subjected to severe overuse. Lastly, much of the painting that was done under Phases I and II was over a year old by the time of the Phase III operation. All of these factors made the painting of those previously painted areas a necessity. We, accordingly, do not agree with plaintiff, that a Phase III painting of areas previously painted during Phases I and II amounts to the performance of a useless and wasteful act. To

[14] N. 4 *supra*, at 30 476

the contrary, we find that the painting was a necessity and these areas were intended to be repainted during Phase III.

We also note that the category (a) areas come within the terms of TP 10-08*a*., and since they cannot reasonably be classified under any of the exceptions of TP 10-09*b*., or as N.I.C. areas, we are all the more convinced of plaintiff's obligation to paint them during Phase III.

Category (b) Areas

We now turn our attention to those areas of the hospital interior that were neither damaged in the earthquake, nor repaired under either of the earlier Phase I or II contracts or under the Phase III contract involved in this action. Plaintiff argues that these areas have no causal relationship to the earthquake, and are clearly beyond the repair purpose of the Phase III contract. Further, plaintiff urges that these undamaged areas are obviously not related to the purpose for which emergency funds are made available by Title 42 U.S.C. § 1855e.

The Board was unconvinced for it quickly disposed of plaintiff's claim by merely referring back to its comments for rejecting plaintiff's claim for compensation for exterior painting. We believe that plaintiff's claim for an equitable adjustment for painting category (b) areas requires a more thorough treatment. However, we should say that plaintiff's arguments fail to convince us that the category (b) areas were intended as a whole not to be covered by the terms of the contract. Since TP 10-08*a*. requires the application of "* * * one coat of the final coat * * *" to all existing surfaces, the category (b) areas obviously come within the contract work requirements. Further, since plaintiff does not point to any other contract provision which is in conflict with TP 10-08*a*., it is necessary for plaintiff to show that some or all of these category (b) areas were not to be painted because they are specifically excepted from the work requirements by TP 10-09*b*., or were specifically excluded from the contract by being designated N.I.C. areas.

A considerable portion of plaintiff's arguments relating to the incorrectness of the Board's decision regarding

category (b) areas is directed to those surfaces designated as N.R.R. (No Repairs Required) on the drawings. Plaintiff shrugs off the fact that these areas literally come within the paint requirements of TP 10-08*a*. by accentuating the repair nature of the Phase III contract. Plaintiff's arguments can be readily disposed of, for if the parties had intended that N.R.R. areas were to be excepted from the painting requirement of TP 10-08*a*., they could have simply accomplished this by so stating in either Technical Provision 10-08 or Technical Provision 10-09. In a case having language similar to that of TP 10-08 and TP 10-09, we noted that, "Plaintiff proffers no reason why those surfaces it contends were to remain unpainted were not listed under 'SURFACES NOT TO BE PAINTED' in the specifications." [17] This same question is relevant and timely here, and the reason for plaintiff's failure to offer an explanation appears clear.

Plaintiff attempts, once again, to exclude category (b) areas, as well as the other categories, from the contract by adding to its familiar argument that the drawings were intended to tell it *where* to paint, the added contention that the surfaces covered by the TP 10-09*b*. (8) exception are shown on the drawings by the designation N.R.R.

Neither party satisfactorily explains what was intended to be excepted by TP 10-09*b*. (8). However, for reasons more fully developed in connection with CLAIM I, we find nothing in the contract specifications which can reasonably be interpreted to direct the contractor to the drawings for the areas it was obligated to paint. Accordingly, we feel that plaintiff's argument is unfounded, and it is not necessary to determining the meaning of TP 10-09*b*. (8).

Plaintiff's failure to show why the category (b) areas were not expressly excluded by Technical Provision 10-09, if that was the intention of the parties, and its unreasonable arguments concerning interpretation of the specification fail to convince us that the decision of the Board is in error. We thus conclude that plaintiff was responsible under the terms of the contract to paint category (b) areas.

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[17] *HRH Constr. Corp. v. United States*, 192 Ct. Cl. 912, 918, 428 F. 2d 1267, 1270-1271 (1970).

Category (c) Areas

Plaintiff states that it was forced to paint areas of the hospital which had never before been painted and that these areas obviously have no relationship to the earthquake repair contract under which it was performing. Plaintiff argues that the paint requirements of the Phase III contract only reflect the intent of the parties if they are interpreted with its earthquake repair purpose as a touchstone. Accordingly, plaintiff urges that it was forced to do work beyond the requirements of the contract and should be compensated.

Plaintiff's argument is unconvincing since the clear language of the specifications, and particularly TP 10–08, encompasses category (c) areas within its literal scope. Plaintiff offers no reasonable arguments to explain how the clear meaning of TP 10–08 can be avoided. We thus conclude that the only areas of the hospital interior which were not intended to be covered by the contract were areas specifically excepted by TP 10–09*b*. or areas that were by mutual agreement designated N.I.C. on the drawings.

Unfortunately, as plaintiff admits, it did not develop the evidence on these points as fully as it might have. The only specific category (c) areas which plaintiff discussed in any detail are a loading dock area, and the surfaces mentioned in a Field Memo. The loading dock area can be quickly disposed of by quoting from the Board's decision with which we agree (67–2 BCA ¶ 6568, p. 30, 477):

> Other examples given of subparagraph c. are the loading dock area and windows and doors. The latter clearly come within no reasonable exception to the painting requirements. Concerning the former our attention is invited to the contractor's letter of 24 September 1965. We find no reference in that letter (Tab 17) to the loading dock area.

However, the question raised by Field Memo No. 77 [18] cannot be as quickly disposed of. The Field Memo states:

> Pending Formal CCO Action:
> You are hereby authorized to apply two (2) Coats of

[18] This September 22, 1965, memo was signed by Mr. William O. Thompson, defendant's Project Engineer, and authorized by Lt. Col. Jack C. Haygood, Resident Engineer and the Contracting Officer's representative.

> TT-P-0055a Exterior PVA Paint over previously unpainted concrete, concrete masonry and cement plaster surfaces within all areas above the eighth (8th) floor level at the Central A-Wing Tower including the Access Rooms and Storage Areas on the 8th floor, the Elevator Equipment and Control Areas on the 9th floor, the Exhaust Fan & Mech. Equipment Room on the 10th floor, and the stairway No. 1. The above 2 coats of TT-P-0055a are to be applied in lieu of the specified coatings ref. para. 10-08a. and 10-08b. (8) and (9).

The Board points out that of all the areas enumerated in the Field Memo, the unpainted stairway is the only one which was not within the scope of required painting called for by the contract. As a result of our independent review of the contract, and particularly Section 10 thereof, we agree with the Board's conclusion. Specifically, we find that the stairway is an item which was excepted from the contract by TP 10-09*b*. (2). Accordingly, our comments which follow are only directed to the Board's treatment of the unpainted stairway mentioned in the Field Memo.

The Board considered the memo and concluded that it only authorized a change in paint. Further, although the Board concedes that the memo authorizes a change in paint for an area which was clearly not within the terms of the contract, it nonetheless finds that the memo "* * * cannot be a direction to paint that feature, in the absence of other evidence or protest." The conclusion of the Board, in our view, is a victory of form over substance. The Board clearly fails to recognize the realities of the work-a-day conditions and relationships that exist on a painting job, and unnecessarily penalizes plaintiff, while, at the same time, permitting defendant to reap an unjustified windfall.

It is difficult to understand why the Board fails to recognize a responsibility on defendant's officers to point out to plaintiff that it was doing work which was not called for by the contract. While Field Memo No. 77 is, in our estimation, enough to support plaintiff's claim of a constructive change, additional documents are available to further strengthen plaintiff's claim.

Specifically by way of a September 23, 1965, letter, plaintiff alerted defendant's resident engineer that it considered Field Memo No. 77, of September 22, 1965, "* * * as a

directive to paint previously unpainted concrete, masonry and cement plaster surfaces, and that no option is granted by the use of the work [sic] 'authorized'." Plaintiff goes on to reasonably request, if Field Memo No. 77 has been misinterpreted, that it be advised in writing. It appears that defendant thus had an opportunity to warn plaintiff that painting of the previously unpainted stairway was being done as a gratuity, and they would not be compensated for their work. We are not aware of any response to plaintiff's request, and therefore conclude that defendant's acts amounted to a compensable constructive change.

Category (d) Areas

We now turn our consideration to the last remaining areas of interior work for which plaintiff claims compensation. Namely, category (d) areas.

There appears to be agreement by the parties that plaintiff was not obligated by the contract to paint any of the surfaces designated N.I.C. in the drawings. However, there is no doubt that some of the N.I.C. surfaces were painted by plaintiff. The question which must now be resolved is whether the subcontractor did the work voluntarily, or was ordered, expressly or constructively, to paint specifically excluded areas by the contracting officer. *See Gholson, Byars & Holmes Constr. Co.* v. *United States*, 173 Ct. Cl. 374, 388, 351 F. 2d 987, 994–995 (1965). If Warren Painting Co. was actually or constructively ordered to paint N.I.C. surfaces, it is entitled to an equitable adjustment. *See WRB Corp.* v. *United States*, 183 Ct. Cl. 409, 420 (1968).

A review of the drawings indicates that several areas, including those identified as A–35, A–36, A–37, A–42 and A–55 were designated as N.I.C. areas. Nonetheless, the subcontractor painted the metal acoustical tile ceilings in the above designated areas.

Defendant brands the acts of the subcontractor as those of a volunteer and summarily dismisses them. It urges this court to treat plaintiff's claim in similar fashion. The Board after reviewing the evidence in support of plaintiff's claim concluded that the contractor was not ordered or directed

* * * to paint any surfaces reasonably falling within these N.I.C. exceptions." We disagree.

A September 18, 1965, memorandum of defendant's project engineer, discloses that he was aware that plaintiff was about to paint areas that were designated as N.I.C. in the drawings. However, instead of informing the crew that the areas were by mutual agreement excluded from the painting requirements of the contract, he reprimanded the crew for not cleaning the areas that were about to be painted. The crew was reminded of the surface preparation requirements of TP 10-06 and TP 10-08*b*. In fact after plaintiff's acting foreman evidenced a lack of familiarity with the specifications, a set was obtained and relevant paragraphs were reviewed. The evidence goes on to show that defendant's project engineer made a number of return visits to the N.I.C. area. Specifically the memorandum states:

> At approximately 10:00 hrs. I checked to see how the painters were progressing. Corridor A-8 (ceiling) was cleaned and ready to receive paint. *Approval was given to paint this area.* I suggested that a couple of the men start painting this cleaned area and the rest of the crew continue to clean the remaining areas. [Emphasis added.]

The remainder of the memorandum goes on to complain about the crew's poor preparation of certain N.I.C. areas. The concern of defendant's project engineer, and the steps he took to insure that the N.I.C. areas were properly prepared and painted is significant.

We are satisfied that plaintiff did not act as a volunteer, but painted these N.I.C. areas after receiving the tacit and, undoubtedly, oral approval of defendant's project engineer.

The case of *Gholson, Byars & Holmes Constr. Co.* v. *United States*, *supra*, is particularly helpful in its expression of the realities that exist in a situation such as we have here. Particularly significant is the following statement, which is found at page 389, 351 F. 2d at 996:

> * * * Indeed, it would be a rather unusual situation for a contractor voluntarily to do substantially more work than is required by the terms of the contract, thus only to increase his costs.

We, accordingly, find that the action of defendant, by way of its project engineer, amounts to a constructive change and plaintiff is entitled to an equitable adjustment for its extra work.

In summary, the evidence shows that plaintiff was ordered to paint at least one stairway and certain N.I.C. areas that were not within the painting requirements of the Phase III contract. The action by defendant in ordering plaintiff to paint these areas amounts to a constructive change of the contract, and plaintiff is entitled to an equitable adjustment for its extra work.

CLAIM III

Application of Excessive Standards of Workmanship

Plaintiff claims that the standards of interior painting, quality and workmanship, to which its subcontractor was held exceed both the standards established by the contract and those customary in the trade for painting of repair work. As a result, plaintiff argues, a constructive change occurred which entitles it to an equitable adjustment for expenditure of labor and materials to meet defendant's unusual and unnecessary high standards of work.

This very same claim, and the arguments allegedly in support thereof, was made by plaintiff to first the contracting officer and later to the ASBCA, without success. The Board after a review of the entire record, but replying primarily on TP 10-07, TP 10-10 and an August 20, 1965, letter from plaintiff to its subcontractor, found plaintiff's claim to be unsupported by the evidence and accordingly denied it.

The question of whether the Government applied too high a standard of workmanship in inspecting the work done by the subcontractor, Warren Painting Company Inc., to the interior of the building, is a question of fact. *See River Constr. Corp. v. United States*, 159 Ct. Cl. 254 (1962); *Maxwell Dynamometer Co. v. United States*, 181 Ct. Cl. 607, 386 F. 2d 855 (1967).

The Wunderlich Act [12] provides that an administrative decision as to factual questions is final unless it is shown to be fraudulent, capricious, arbitrary, or grossly erroneous as

[12] N. 5, *supra*, 41 U.S.C. § 321

to necessarily imply bad faith, or is not supported by substantial evidence.

The manner in which administrative determinations are to be reviewed by this court has been the subject of numerous inquiries. For example in *Pittmore-Falmouth Corp. v. United States*, 182 Ct. Cl. 507, 390 F. 2d 664 (1968), we pointed out that if a reasonable man, after a review of the entire record finds the evidence to be such that he could have reached the conclusion arrived at by the administrative tribunal, then we are precluded from substituting our judgment for that of the agency involved.

Similarly we pointed out in *Carlo Bianchi and Co. v. United States*, 167 Ct. Cl. 364, 367–368 (1964), *cert. denied* 382 U.S. 841 (1965):

> The task before this court under the Supreme Court decision is to review the determination of the Board of Claims and Appeals of the Corps of Engineers and decide whether there was substantial evidence in the record as a whole before that Board to justify its conclusion. In reaching our conclusion, we cannot disregard plaintiff's evidence. However, even though we might have decided as an original matter with plaintiff on balance, the decision of the Supreme Court requires us to go further and uphold the Board's decision if there was substantial evidence to support the Board's decision on the record as a whole.

Our review of plaintiff's claim is necessarily guided by the above standards.

While plaintiff interwove a number of arguments to support its claim, they all substantially fall into one of the following subheadings:

(a) the standard of acceptable workmanship to which plaintiff's painting must be compared is that prevalent in the Anchorage area for a one-coat paint job;

(b) the deficiency lists, so-called punch lists, indicate that too meticulous an inspection was being imposed by the Government for a one-coat paint job;

(c) as a result of the imposition of higher standards of inspection, the subcontractor was put to the unnecessary expense of not only cleaning up unjustified deficiencies, but of also applying excessive amounts of paint, at increased costs of time and material, to obtain job approval.

We now consider each of the claims embodied in the above subheadings to determine if there is substantial evidence to support the Board's determination.

(a) Standard of Workmanship

Plaintiff urges that the standard of workmanship to which its subcontractor should have been held was that which prevailed in the Anchorage area. Extensive testimony by both plaintiff and defendant was elicited on this subject. Plaintiff suggests that the standard which should have been used by defendant's inspectors is best expressed by the following testimony of an area architect:

> * * * a one-coat job * * * is generally done to save the owner some money, he knows that he is not going to get the best job and that perhaps later on that he can have it probably repainted in a year or two in normal housekeeping efforts. If you want a better job, you ask for two coats.
>
> * * * where you are inclined to see where a crack has been repaired * * * you will touch up the crack and then go over the whole surface again. Sometimes this repair work is visible or it isn't completely covered, but you accept the job as in the best workmanlike manner.

Defendant does not disagree with this statement, and thus we accept it as stating the prevailing Anchorage standard of workmanship for a one-coat paint job.

However, there is considerable confusion in the record as to which surfaces were to receive only a touch-up and one final coat and thus were to be judged by the above standard, and which were to be stippled and thus subject to perhaps another standard.

Stippling by plaintiff's own testimony is not a touch-up and one-coat final paint job. Plaintiff goes on to explain that stippling is a method of achieving a textured effect on a surface. The additional paint and labor required to stipple a surface was adequately expressed for plaintiff by Mr. Warren, himself, who testified that it required the application of an extremely heavy coat of paint. The paint is then allowed to set until its starts to dry, and then a specially adapted stipple roller is used to obtain the desired textured effect.

It is fair to conclude, from plaintiff's own evidence that substantial portions of the interior of the hospital were stip-

pled. Plaintiff's own testimony further indicates that a stippling paint job requires at least two coats of paint. Indeed, the testimony as a whole clearly brings out that we are not here concerned exclusively with a one-coat paint job. It should also be emphasized that to the extent plaintiff had to stipple the interior of the hospital and thus use more paint and labor than it would have for a one-coat paint job, it has been compensated by the Board.[20]

It is significant since it points out that while there may not have been a dispute between the parties as to the prevailing standard for a touch-up and a one coat of paint job, plaintiff has not carefully shown, in those instances that it alleged the use of a wrong standard of inspection, that the surfaces were only to receive a touch-up and one final coat of paint.

Notwithstanding the extensive testimony concerning the prevailing Anchorage standard of workmanship for one-coat paint jobs, and the confusion in the record concerning whether the areas being inspected were to receive one or two coats of paint, the Board in its decision rightly pointed out that the following contract specifications set forth a standard of workmanship to which the parties agreed to be bound:

> 10-06 CLEANING AND PREPARATION OF SURFACES:
>
> *a. General:* * * * Surfaces to be painted shall be clean before applying paint or surface treatments. * * * Painting shall not proceed until all imperfections, cracks and holes in surfaces to be painted are repaired in an approved manner. Any newly painted surfaces marred or otherwise damaged and all existing painted surfaces shall be cleaned, repaired and repainted.
>
> * * * * *
>
> 10-07 PAINT APPLICATION:
>
> *a. General:*
>
> (1) *All work* shall be done in a workmanlike manner, and the finished surfaces shall be free from runs, drops, ridges, waves, laps, brush marks, and variations in color, texture and finish. The hiding of the last required paint coat shall be so complete that the addition of another coat of paint would not increase the hiding. All coats shall be so applied as to produce film of uniform thickness. Special attention shall be given to insure that edges,

[20] N. 4, *supra*, at 30,477-78.

corners, crevices, welds, and rivets receive a film thickness equivalent to adjacent painted surfaces. Prior to application of final finish coats, surfaces shall be carefully examined and, where necessary, touch-ups shall be accomplished to eliminate all holidays, dull spots, or suction spots. * * *

* * * * *

10-10 CLEANING: * * * Paint spots, oil, or stains upon adjacent surfaces shall be removed and the entire job left clean and acceptable.

Our review of the record indicates that the Board correctly applied this standard in evaluating plaintiff's claim, and we concur in its application.

(b) Meticulous Application of Standard of Workmanship

Plaintiff argues at length that the Government inspectors did not conduct their inspection in accordance with the touch-up and one final coat of paint standard of workmanship to which it should have been held. While, as concluded above, we find that plaintiff should have been held to the standards of workmanship that it agreed to in the contract, to the extent it differs from a touch-up and one final coat standard, we find that the evidence does not support plaintiff's charge of overly critical or meticulous inspections by defendant for either standard.

A number of witnesses for plaintiff testified as to the high standard of inspection to which the job was held. Mr. Warren, himself, testified that in a one-coat paint job all that can be expected is to obtain an overall clean appearance, and that it is not unusual to have brush marks, some transparent spots, and even small skips, known in the trade as cateyes or holidays. Further testimony by plaintiff's witnesses, supporting Mr. Warren's testimony, went on to point out that a floodlight or flashlight was used by the inspectors to get a "real close look" at the painted surface. By this technique one witness explained, the inspectors were able to "* * * go up to a wall and just about look through the paint on a one-coat job." Other witnesses for plaintiff testified that the inspectors did not conduct a one-coat, walk-through-type inspection. They explained that in this type of inspection the surfaces are viewed from about four to six feet. Whereas in the inspection

of the Elmendorf Hospital, the inspectors were within a few inches of the freshly painted surfaces. This, the witnesses explained, is the reason that minor type deficiencies, which normally are acceptable, were picked up and placed on deficiency lists.

When we look to defendant's testimony, we find that there is disagreement between the parties as to how the inspections were carried out. Defendant's testimony shows that the inspectors were told not to "nit pick the job apart," and that the important thing in carrying out the inspection was to make sure that the surfaces were reasonably covered. Further testimony showed that the inspectors were told to, and did, conduct their inspections from a distance of four to six feet from the freshly painted surface. The testimony also shows that the inspectors were only to require a repainting of deficiencies which were noticeable from this distance.

Plaintiff's allegation concerning the use of a "floodlight" by inspectors to test the paint coverage attained by its subcontractor is also unconvincing. Indeed the testimony of defendant's inspectors indicates that floodlights were used primarily to inspect replastered walls to insure that all plaster cracks had been properly sealed, and did not show through the final coat of paint. In the instances where floodlights were employed to inspect a freshly painted room or area, it was shown that either the lighting fixture in that room or area had been damaged by the earthquake and no proper light source was accordingly available, or that the areas were poorly lighted and additional light was needed to facilitate the inspection.

We thus must conclude that not only is there substantial evidence in the record to support the Board's determination, but also a noticeable lack of convincing evidence on the part of plaintiff that the work was subjected to an overly meticulous inspection.

(c) Expenditure of Excessive Time and Material

Plaintiff alleges that the meticulous inspection procedure practiced by defendant resulted in the expenditure of excessive material and labor in order to have its work accepted.

While plaintiff's testimony does indicate that its labor and material costs were significantly increased as a result of the inspection by defendant, we are not convinced. Plaintiff's testimony is lacking in specifics and consists primarily of general statements by its witnesses.

On the other hand, defendant's testimony showed, as a result of some 100 paint samplings, covering about 10% of the hospital surfaces painted, that over half of the hospital had a one-coat thickness of paint while the other half had between one and two coats. Thus the evidence is not clear that plaintiff used excessive amounts of paint in carrying out the work requirements of the contract. Furthermore, even if we conclude that plaintiff was forced to use excessive amounts of paint and labor, the record does not clearly show if these expenditures were made in connection with areas that were to receive the touch-up and one-coat paint job or in carrying out the stippling order of defendant, for which plaintiff has been compensated by the Board. We, therefore, agree with the Board when it said:

> We find the work was not subjected to such meticulous inspections as claimed. It is not the fact, as claimed, that the single coat requirement called only for a "clean-up" job permitting certain imperfections. Technical Provision 10-07 above quoted required finished surfaces to achieve a hiding equivalent to that of an additional coat and to be free of the stated imperfections. Although this undoubtedly required a more careful and possibly fuller application than would have been necessary if another coat were to follow, the specification itself was the measure of the undertaking and it was not required to be exceeded. To a substantial degree such heavy application of the non-stipple type paint specified, as was required to support the stippling process, will be compensated under our allowance of claim item 3 above.

After a careful review of the entire record, we do not find support for plaintiff's claim for an equitable adjustment. To the contrary, we find the Board's factual determinations are not fraudulent, capricious, arbitrary, or grossly erroneous as to necessarily imply bad faith, and that they are supported by substantial evidence.

CONCLUSIONS

CLAIM I

Plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and the petition in this claim is dismissed.

CLAIM II

Plaintiff's motion for summary judgment with respect to the painting of one stairway and certain N.I.C. areas is granted, and defendant's cross-motion to that extent is denied. Further proceedings are stayed pursuant to Rule 167 for a period of ninety (90) days to afford the parties an opportunity to obtain an agency resolution of the amount of the equitable adjustment to which plaintiff is entitled.

CLAIM III

Plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and the petition in this claim is dismissed.